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No.

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IN THE

Supreme Court of the United States

October Term, 1981

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

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QUESTIONS PRESENTED

Whether the notice provision of the Pennsylvania Real Estate Tax Sale Law is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution because the statute, on its face and as applied herein, fails to require or provide for notice reasonably calculated to apprise a record mortgagee of the pendency of a tax sale which destroys the mortgagee's valuable recorded interest in the property.

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OPINIONS BELOW

The Judgment and Decree of the Supreme Court of Pennsylvania, Eastern District, No. 461, January Term, 1979, filed May 19, 1982, is unaccompanied by any written Opinion. The Opinion of the Commonwealth Court of Pennsylvania, at No. 944, C. D. 1978, filed July 18, 1979, is reported at 44 Pa. Commonwealth Ct. 301, 404 A. 2d 709 (1979). The Opinion accompanying the Final Decree in Equity in the Court of Common Pleas of Lancaster County, Pennsylvania, is reported at 66 Lancaster Law Review 247 (1978). The Adjudication and Decree Nisi in the Court of Common Pleas of Lancaster County, Pennsylvania, is reported at 66 Lancaster Law Review 243 (1978).

JURISDICTION

This is a direct appeal, pursuant to 28 U. S. C. § 1257(2) from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania, entered on May 19, 1982, which dismissed the appeal of First Pennsylvania Bank, N. A. to that Court. The Judgment of the Supreme Court of Pennsylvania sustained the validity of the Pennsylvania Real Estate Tax Law, specifically the notice section of that statute, 72 P. S. § 5860.602, in the face of a challenge by appellant First Pennsylvania Bank, that the Act was repugnant to the Fifth and Fourteenth Amendments to the United States Constitution.

The question of notice under the Fifth and Fourteenth Amendments to the United States Constitution was raised initially in the Complaint in Equity of First Pennsylvania Bank and has been timely raised and preserved at all stages of this litigation. The Chancellor noted in his

Adjudication and Decree Nisi entered on November 10, 1977, that the only issue was whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for notice of a proposed tax sale (which destroys the mortgage) to the mortgagee. The Chancellor expressly concluded that the Pennsylvania Real Estate Tax Sale Law did not violate the Fifth and Fourteenth Amendments to the United States Constitution by failing to require personal notice to a mortgagee. The same issue was considered by the Court of Common Pleas of Lancaster County, Pennsylvania, sitting *en banc*, which dismissed First Pennsylvania's exceptions to the Chancellor's Adjudication and Decree Nisi and entered a Final Decree on February 21, 1978. The constitutional issue was raised on appeal to the Commonwealth Court of Pennsylvania, which affirmed the Chancellor's Adjudication and Decree Nisi and the Opinion and Final Decree of the Court of Common Pleas of Lancaster County. The constitutional issue was raised on appeal to the Pennsylvania Supreme Court, which dismissed First Pennsylvania's appeal, thereby rendering a decision in favor of the validity of the Pennsylvania Real Estate Tax Sale Law, Act of July 7, 1947, P. L. 1368, Act VI § 602, 72 P. S. § 5860.602.

This appeal is being docketed in this Court within ninety (90) days from the entry of the Judgment of the Supreme Court of Pennsylvania, which was entered on May 19, 1982. The Notice of Appeal was filed in the Supreme Court of Pennsylvania on August 6, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States, provides in Section I as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The notice of provision of the Pennsylvania Real Estate Tax Sale Law provides, in relevant part:

> "Prior to any scheduled sale the bureau shall give notice thereof, once a week for three (3) consecutive weeks in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (a) the purposes of such sale, (b) the time of such sale, (c) the place of such sale, (d) the terms of the sale including the approximate upset price, (e) the descriptions of the properties to be sold as stated in the claims entered, each description commencing with '. . . . . .

. . . . . .

Name of Owner

. . . . . .

Description

Where the owner is unknown and has been unknown for a period of not less than ten years, the name of the owner need not be included in such description.

The description may be given in intelligible abbreviations.

Such published notice shall be addressed to the 'owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties.'

In addition to such publications, similar notice of the sale shall also be given by the bureau, at least ten (10) days before the date of the sale, by United States registered mail, personal addressee only, return receipt requested, postage prepaid, to each owner as defined by this act and by posting on the property.

The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the date of sale enters into an agreement with the bureau to pay the taxes in instalments, in the manner provided by this act, and the agreement entered into." 72 P. S. § 5860.602.

Section 609 of the Act provides that certain liens are divested by the tax sale:

"Every such sale shall discharge the lien of every obligation, claim, lien or estate with which said prop-

erty may have or shall become charged, or for which it may become liable, except no such sale shall discharge the lien of any ground rent or mortgage which shall have been recorded before such taxes became liens, and which is or shall be prior to all other liens, except other mortgages and ground rents." 72 P. S. § 5860.609.

STATEMENT OF THE CASE

As security for a promissory note in favor of appellant, First Pennsylvania Bank, N. A., First Pennsylvania recorded a mortgage on real estate in Lancaster County, Pennsylvania on April 25, 1973. The mortgage has not been assigned or satisfied by First Pennsylvania Bank.

First Pennsylvania's note and mortgage have been in default since April 26, 1974. To date, First Pennsylvania Bank has received neither principal nor interest due it under the obligation secured by its mortgage.

The 1972 real estate taxes on the property were not paid by the owner of the property, Bernard DiSabatino. Because the taxes on the property remained unpaid, the Lancaster County Tax Claim Bureau commenced proceedings to sell the real estate to collect the outstanding taxes.

The Tax Claim Bureau Notice of Tax Sale dated August 12, 1974, identified the owner of the property to be sold as Bernard DiSabatino. The property subject to be sold was described as "13 J 13-2-18 LR36006 in Millersville."

The Notices of the tax sale, which were published in local newspapers, complied with § 602 of the statute. "Notices" of the tax sale appeared in two Lancaster County, Pennsylvania, newspapers, the *Lancaster New Era* and the *Intelligences Journal*, once a week for three successive weeks, on September 13, 20 and 27, 1974. On October 11, 1974, "notice" of the tax sale appeared in the Lancaster Law Review.

First Pennsylvania Bank, N. A., owner of a valuable recorded mortgage in the subject real estate, never received notice of the tax sale, nor was First Pennsylvania given any notice in time to exercise any right of redemp-

tion with respect to the property or to move to object the sheriff's distribution.

Lancaster County and the Commonwealth of Pennsylvania had knowledge and notice of First Pennsylvania's recorded mortgage in the property sold at the tax sale. The mortgage, including the name and address of First Pennsylvania as mortgagee, was on file in the County Recorder's Office. Before the property was sold at the tax sale, the Solicitor of the Tax Claim Bureau, who was present at the time, was informed that the property was subject to a mortgage. The property was sold at a tax sale on October 19, 1974, to Della Becker. Della Becker's son, Heywood Becker, as agent for his mother, bid and paid the sum of $854.68, *i.e.*, a sum equal to the upset sale price announced at the tax sale.

The fair market value of the real estate in January, 1976, was approximately $185,000.00. At the time of trial, the property had a fair market value in excess of $185,000.00.

The Lancaster County Tax Claim Bureau, by deed dated and recorded January 25, 1975, conveyed the real estate, which is the subject of this appeal, to Della Becker, free and clear of First Pennsylvania Bank's recorded mortgage, which had been discharged by the sale.

The Pennsylvania Real Estate Tax Sale Law does not provide for or require any notice to a record mortgagee, such as First Pennsylvania. The Chancellor found as a fact that First Pennsylvania never received any personal or mailed notice of the tax sale. Nevertheless, the Real Estate Tax Sale Law provides that a tax sale destroys a mortgagee's interest. 72 P. S. § 5860.609 (1968).

Upon learning that its valuable mortgage had been destroyed by the tax sale, First Pennsylvania promptly filed a Complaint in Equity against the Lancaster County Tax Claim Bureau and Della Becker. First Pennsylvania

claimed that the Pennsylvania Real Estate Tax Sale Law was unconstitutional in that it authorized the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. First Pennsylvania sought a decree which would (1) declare the tax sale held on October 19, 1974, to be invalid and void; (2) cancel and strike the deed from the Lancaster County Tax Claim Bureau to Della Becker dated January 24, 1974; and (3) confirm and reinstate the mortgage lien of First Pennsylvania in the property.

The Honorable Wilson Bucher of the Court of Common Pleas of Lancaster County, Pennsylvania, stated in the Adjudication that the "only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales."

Chancellor Bucher found that the "Pennsylvania Real Estate Tax Sale Act is constitutional and does not offend the Fifth and Fourteenth Amendments to the United States Constitution." Chancellor Bucher found that First Pennsylvania was not denied due process of law in connection with the sale of real estate which resulted in the discharge of its mortgage lien. Chancellor Bucher also found that First Pennsylvania was not entitled to personal or mailed notice of the tax sale.

First Pennsylvania filed exceptions to Judge Bucher's Decree Nisi, specifically addressing the Chancellor's finding that the Pennsylvania Real Estate Tax Sale Law is constitutional. The Court *en banc* affirmed the Chancellor's findings and entered a Final Decree on February 21, 1978.

First Pennsylvania Bank appealed to the Commonwealth Court of Pennsylvania, which affirmed the Final Decree in Equity of the Court of Common Pleas by Order

filed on July 18, 1979. In a one paragraph Opinion, the Honorable Richard DiSalle of the Commonwealth Court stated that the affirmance was "on the basis of Judge Bucher's Adjudication and Decree Nisi dated November 10, 1977, and the Opinion and Final Decree dated February 21, 1978. . . ." First Pennsylvania appealed this case to the Pennsylvania Supreme Court, which, after full briefing and oral argument, dismissed the appeal.

First Pennsylvania's claim that the notice provision of the Pennsylvania Real Estate Tax Sale Law is unconstitutional on its face and as applied, has been raised in timely fashion and has been preserved at every stage of the proceedings below; the issue is properly before this Court for decision.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. Whether the Notice Provision of the Pennsylvania Real Estate Tax Sale Law Is Repugnant to the Fifth and Fourteenth Amendments to the United States Constitution Because the Statute, on Its Face and as Applied Herein, Fails to Require or Provide for Notice Reasonably Calculated to Apprise a Mortgagee of the Pendency of a Tax Sale Which Destroys the Mortgagee's Valuable Recorded Interest in the Property.

A. The Notice Provision of the Pennsylvania Real Estate Tax Sale Statute Fails to Provide or Require Notice to a Record Mortgagee.

The question raised in this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution, because the lower courts have sustained the validity of a statute of the Commonwealth of Pennsylvania which provides for and requires no actual or personal notice of the pendency of a tax sale to the owner of a recorded mortgage, even though the tax sale conducted pursuant to the statute discharges the mortgage lien in the real property which is the subject of the sale. The substantial question which requires the plenary review by this Court is whether the notice provision of the Pennsylvania Real Estate Tax Sale Law is unconstitutional on its face and as applied under the circumstances of this case insofar as the statute omits the requirement of notice reasonably calculated to apprise a mortgagee of the pendency of a tax sale which destroys the mortgagee's valuable interest in real property.

The tax sale at issue in this case was conducted pursuant to the procedures established and governed by the Pennsylvania Real Estate and Tax Sale Law, Act of July 7, 1947, P. L. 1368, No. 542, Act I, § 101, *et seq.*, as amended, 72 P. S. § 5860.101 *et seq.*, which does not pro-

vide for any notice to record mortgagees. The published notice in the local newspapers complied with § 602 of the statute.

The Chancellor found as a fact that First Pennsylvania never received personal or mailed notice of the tax sale. The Chancellor's Adjudication depends upon the constitutionality of the "constructive notice" provided by § 602 of the statute.

Section 602 of the Act provides for three forms of notice of an impending tax sale. Publication in newspapers of general circulation and in the legal journal is addressed to "owners" (as defined in the Act) and "all persons having tax liens, tax judgments or municipal claims against the property described in the notice." The second form of notice, by certified mail, personal addressee only, is given only to "owners" (again, as defined by the Act). The third form of notice, posting on the property, is required to be "similar" to the published notice insofar as the posted notice must be addressed specifically to attract the attention of "owners" and "all persons having tax liens, tax judgments or municipal claims" against the property described in the posted notice.

The Act clearly provides that a tax sale destroys a mortgagee's interest. 72 P. S. § 5860.609 (1968). The Court of Common Pleas of Lancaster County reached the astonishing conclusion, which the Appellate Courts of Pennsylvania affirmed, that First Pennsylvania, a record mortgagee, known to Lancaster County and the Commonwealth of Pennsylvania, was not denied due process, although the tax sale conducted without notice to First Pennsylvania resulted in the destruction of First Pennsylvania's valuable recorded interest in real property. As a practical matter, First Pennsylvania's mortgage constituted the most valuable interest and investment in the property at the time; therefore, the effect of the tax sale

was to destroy the most valuable property interest in the real estate, in the absence of meaningful notice reasonably calculated to apprise the mortgagee of the pendency of the tax sale which destroys the mortgage lien.

B. The Pennsylvania Real Estate Tax Sale Statute, on Its Face and as Applied in This Case, Is Repugnant to the Fifth and Fourteenth Amendments to the United States Constitution by Failing to Provide Reasonable Due Process Notice to a Mortgagee of the Pendency of a Tax Sale.

The legality of the notice provision of the Pennsylvania Real Estate Tax Sale Law must be tested against a well-settled and developed body of constitutional law.

In the seminal "notice" case, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which concerned statutory notice to beneficiaries of a common trust fund of a judicial settlement of accounts, this Court held that statutory notice by publication in a local newspaper failed to provide the beneficiaries with due process required by the Fourteenth Amendment. 339 U. S. at 311. This Court stated:

> "Certainly the proceeding is one in which [the beneficiaries] may be deprived of property rights and hence notice and hearing must measure up to the standards of due process." *Id.*

As this Court explained:

> "The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U. S. 385, 294. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> • • •

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U. S. 457; *Grannis v. Ordean,* 234 U. S. 385; *Priest v. Las Vegas,* 232 U. S. 604; *Roller v. Holly,* 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co. v. Zeiss,* 219 U. S. 47, 67; and *see Blinn v. Nelson,* 222 U. S. 1, 7.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defensed on the ground that it is in itself reasonably certain to inform those affected. . . ." 339 U. S. at 314-15.

The Chancellor recognized that First Pennsylvania Bank "never received any personal notice of the tax sale." The Chancellor concluded that the published "notice"

complied with the Fifth and Fourteenth Amendments to the United States Constitution. The Chancellor erroneously misplaced the burden on First Pennsylvania to exercise "modest efforts" to protect its valuable property interest, *i.e.*, "a subscription to the local law review and a perusal of its tax sales notices [which] would have been sufficient to apprise [First Pennsylvania] that [its] security was in jeopardy." This reasoning cannot withstand analysis under the Fifth and Fourteenth Amendments. The burden remains with the state agency to provide reasonable notice of the pendency of the adverse action.

The Chancellor's attempt to justify the deprivation which occurred in this case fails to reconcile the notice provision of the Pennsylvania Real Estate Tax Sale Statute with the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution. The Act, on its face, does not provide for or require notice to mortgagees. First Pennsylvania had no reason to know of the immense premium of protection provided by subscription to local newspapers and the law journal in every county in which it holds a mortgage. There is no such burden, consistent with the Fifth and Fourteenth Amendments, imposed on a mortgagee.

The "notices" here are typical of published notices of tax sales in local newspapers. It is fantastic to equate such "notices" with the "notice" contemplated by the Fifth and Fourteenth Amendments to the United States Constitution, especially when one considers the value of such "notices" to a non-possessory and non-resident mortgagee.

> "Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interest. We have before indicated in reference to notice by

publication that, 'great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.'" 339 U. S. at 320, *citing*, *McDonald v. Mabee*, 243 U. S. 90, 91 (1917).

In *Mullane*, Mr. Justice Jackson wrote:

"It would be idle to pretend that publication alone as prescribed here [by statute], is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspapers' normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." 339 U. S. at 315.

Mullane rejects any contention that notice by publication is reasonable, adequate or constitutional when the name and address of the interested person are known or discoverable with reasonable diligence:

"As to known present beneficiaries [*i.e.*, persons with interests in property against which action is pending] of known place of residence, however, notice by pub-

> lication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. *Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.*" 339 U. S. at 318 (emphasis added).

In *Mullane*, this Court held that where the trustee had the names and addresses of beneficiaries "on its books" there was "no tenable ground for dispensing with a serious effort to inform them personally . . . at least by ordering mail to the record addresses." 339 U. S. at 318. *Cf. Wuchter v. Pizzutti*, 276 U. S. 13 (1928). The Chancellor found as a fact that First Pennsylvania was the owner of a *recorded* mortgage. The mortgage was recorded in the office of the Recorder of Deeds in Lancaster County, Pennsylvania, (*i.e.*, the same office in which the deed to the subject property was recorded). Lancaster County and the Commonwealth of Pennsylvania were given certified, recorded and actual notice of First Pennsylvania's valuable interest in real property. The name and address of First Pennsylvania Bank were readily available. The attorney for the Tax Claim Bureau was informed of the mortgage prior to the sale of the property.

In *Schroeder v. City of New York*, 371 U. S. 208 (1962), the appellant was not notified of condemnation proceedings which had been instituted against her property. This Court held that "newspaper publication and posted notices in the circumstances of this case did not measure up to the quality of notice which the due process clause of the Fourteenth Amendment requires." 371 U. S. at 211. In *Schroeder*, New York law provided that notice

of condemnation proceedings was to be given to affected property owners by publication in newspapers and by posting of handbills in the vicinity of the condemned real estate. Although the appellant's name and address were readily ascertainable from deed records, neither the newspaper publications nor the posted notices contained the *names* of the appellant nor of any affected property-owner. 371 U. S. at 210. This Court held: "The posting of these signs, therefore, did not constitute the personal notice that the rule enunciated in the *Mullane* case required." 371 U. S. at 213.

In this case, the "notices" were not addressed or directed personally to First Pennsylvania. The Act does not require notice to a mortgagee, nor is there any requirement that any notice be addressed to a mortgagee. It is unreasonable to assume that First Pennsylvania would ever see any posted or published notice due to the fact that First Pennsylvania's principal place of business is in Philadelphia, not Lancaster County. The notices in this case were completely ineffectual.

In *Schroeder*, this Court reiterated its view of the "inadequacies of 'notice' by publication." 371 U. S. at 212. This Court cited *New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, 296 (1953), "where the court pointed out that '[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '[i]ts justification is difficult at best.'" 371 U. S. at 213. This Court, in dictum, has held that there is just as much reason to give creditors mailed notice as there is to give mortgagees mailed notice. *See e.g., New York v. New York, N. H. & H. R. Co., supra*, at 296.

In *Curtis v. Redevelopment Authority*, 482 Pa. 58, 393 A. 2d 377 (1978), the Supreme Court of Pennsylvania held that when the record holder of an easement could be identified through the investigation of land and tax

records, any notice short of mailed notice to the easement holder was insufficient and failed to comply with the requirements of due process. 482 Pa. at 64-65, *following Schroeder v. New York, supra*, and *Mullane v. Central Hanover, supra*. In *Curtis*, Justice Robert N. C. Nix, Jr., of the Pennsylvania Supreme Court explained:

> "There was no affirmative burden on appellant to inspect the servient estate in order to be put on notice by the postings. To the contrary, the burden was on the Authority to conduct a search for recorded interests and then to take reasonable steps to notify holders of such recorded interest. To hold otherwise would countenance the practice of the Authority of ignoring the recording system of this jurisdiction." 482 Pa. at 65.

There can be no doubt that First Pennsylvania owned a valuable property interest in the property which was sold at the tax sale in this case. The Chancellor's attempt to restrict due process protection to "owners" must be viewed in light of *Mullane*, which spoke of protection given property interests in a generic sense. *See also, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 608 (1965) (this Court eschewed any difference in due process protection based on a distinction between various forms of property interests. "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the due process clause."). *Fuentes v. Shevin*, 407 U. S. 67, 89-90 (1972) (rejecting differences in due process protection based on the type of property concerned).

Moreover, this Court may take judicial notice that most commercial property today is acquired by third-party financing where the owners and mortgagees of the

property often live far removed from the property itself. Providing written notice to the mortgagee of record would serve and not frustrate the underlying purpose of the creation of a municipal agency charged with the responsibility for collecting unpaid taxes. The purpose of the Real Estate Tax Sale Law is, of course, to collect taxes and not to conduct tax sales for the purpose of destroying valuable property rights and at the same time providing windfalls to the speculators who attend such sales. Requiring a taxing authority to provide actual or personal notice of a pending tax sale to mortgagees of record would further the bona fide state interest in collecting real estate taxes. In many instances, such as the case at hand, it is the financial institution holding the mortgage which has the most significant interest in the real estate and is in the best financial position to pay the taxes rather than risk the loss of its investment. There should be little doubt that had First Pennsylvania received notice of the impending tax sale, the taxes would have been paid and First Pennsylvania would not have lost its mortgage interest in property valued at approximately $185,000.00.

The mere fact that First Pennsylvania may have received notice of a tax lien or that First Pennsylvania's lien was junior to the tax lien does not remove the due process requirement of notice of the actual pendency of the tax sale proceeding. Notice of the possibility of state action is not coterminous with notice of the actual pendency of the adverse state action. *Mullane* requires notice "that the matter is pending. . . ." 339 U. S. at 314. *See e.g., Fuentes v. Shevin*, 407 U. S. 67 (1972) (purchasers, who signed installment sales contracts for goods, under which contracts the seller retained title and was given the right to repossess the goods upon the purchaser's default, were entitled to prior notice and an opportunity

to be heard before state authorized agents could repossess and seize the goods; certainly, in *Fuentes*, the purchaser had notice of the claim of the seller; nevertheless, *Fuentes* clearly requires notice of the actual pendency of the adverse government action).

A trial court in Berks County, Pennsylvania, recently held that a judgment creditor of the owner of property who had a junior lien against property sold at a tax sale, was denied due process of law, although the published notice complied with § 602 of the statute. *In re: Upset Sale, Tax Claim Bureau of Berks County, Pennsylvania*, No. 361 October, 1979, A. D., No. 800 October, 1979, J. D. (Berks County, Pa., Opinion filed July 16, 1982) (A copy of the trial court's written Opinion is set forth in full at the Appendix hereto). The judgment creditor argued that the statute was unconstitutional insofar as it deprived junior lien creditors of notice and deprives them of a valuable property right, *i.e.*, their liens, without due process of law. The Berks County Court agreed, finding § 602 of the Act to be unconstitutional.

The Chancellor's decision in this case, which was ultimately affirmed by the Pennsylvania Supreme Court, runs afoul of the line of decisions from this Court requiring notice reasonably calculated under all the circumstances to apprise the owner of a property interest of the pendency of proceedings which will adversely affect his interest so as to require more than mere published notice in a local weekly newspaper.

Finally, a review of the lower court's opinions and decisions set forth in the Appendix hereto should demonstrate that no adequate or independent state law grounds exist to support the judgment. Indeed, the Chancellor limited his discussion to only one issue: whether the notice provided by the Pennsylvania Real Estate Tax Sale Law comports with due process. It does not.

II. Conclusion

The judgment of the Supreme Court of Pennsylvania, which sustained the validity of the Pennsylvania Real Estate Tax Sale Law notice provision in the face of First Pennsylvania Bank's challenge that the notice provision is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution should be reversed and vacated. The notice provision, on its face, and as applied under the circumstances of this case, violates federal constitutional requirements of notice reasonably calculated under all the circumstances to apprise a mortgagee of the actual pendency of a tax sale which discharges the mortgage lien. This appeal should be granted plenary review because the federal question posed is substantial and there are no adequate and independent state law grounds supporting the judgment of the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

RICHARD M. SHUSTERMAN
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Attorneys for Appellant

Of Counsel:
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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,

Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU and DELLA BECKER

Appeal from Decree of Commonwealth Court entered July 18, 1979, at No. 944 C.D. 1978, Affirming Final Decree in Equity of Court of Common Pleas of Lancaster County, Civil Action—Equity, at No. 16 Equity Docket, Page 242

ARGUED: April 20, 1982

DECREE

PER CURIAM FILED: MAY 19, 1982

Appeal dismissed as having been improvidently granted.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 944 C.D. 1978

FIRST PENNSYLVANIA BANK N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU AND DELLA BECKER,
Appellees

BEFORE:

HONORABLE ROY WILKINSON, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE RICHARD DISALLE, *Judge*

ARGUED: March 8, 1979—Harrisburg

OPINION

OPINION BY JUDGE DISALLE FILED: JULY 18, 1979

This is an appeal from the final decree in equity of the Court of Common Pleas of Lancaster County which affirmed the Chancellor's adjudication and decree nisi dismissing the complaint filed by the First Pennsylvania Bank N.A. In so doing, the Chancellor refused to set aside the disputed tax sale and held the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S.

§ 5860.101 et seq., to be constitutional. We affirm on the basis of Judge Bucher's Adjudication and Decree Nisi dated November 10, 1977, and the Opinion and Final Decree dated February 21, 1978, at Equity Docket No. 16, Page 242.

/s/ RICHARD DISALLE
Richard DiSalle, Judge

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 944 C.D. 1978

FIRST PENNSYLVANIA BANK N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU
AND DELLA BECKER,
Appellees

ORDER

AND Now, this 18th day of July, 1979, the final decree in equity of the Court of Common Pleas, dated February 21, 1978, is hereby affirmed.

/s/ RICHARD DISALLE
Richard DiSalle, Judge

FINAL DECREE OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY CIVIL—EQUITY

FIRST PENNSYLVANIA BANK

v.

LANCASTER COUNTY TAX CLAIM BUREAU

Saul, Ewing Remick & Saul, for Exceptions.

Herr, Kirchner, Greer & Herr and Maurice M. Green, contra.

OPINION BY BUCHER, J., FEBRUARY 21, 1978.

The matter before the court en banc concerns exceptions filed by plaintiff and defendant, Della Becker, to an adjudication and decree nisi by the Chancellor which dismissed plaintiff's complaint. Defendant's exceptions go mainly to the Chancellor's failure to make certain findings of fact and conclusions of law. Plaintiff's exceptions go to the Chancellor's finding that the Pennsylvania Real Estate Tax Sale Law is constitutional and his failure to find that equitable considerations compel the setting aside of the tax sale.

We affirm the Chancellor's adjudication. His finding that the Pennsylvania Real Estate Tax Sale Law is constitutional has received recent support in an opinion by Judge Newcomer of the District Court for the Eastern District of Pennsylvania in the case of *First Pennsylvania Bank N. A. v. Country Investment Corp.*, Civil Action No. 76-3401, the opinion being dated January 4, 1978.

Nor do we find that equitable considerations require the setting aside of the tax sale. Concerning this aspect of the case we make the following additional findings of fact for the assistance it may give to a reviewing court:

ADDITIONAL FINDINGS OF FACT

16. Both tracts of land referred to in findings of fact 11 and 12 were assessed in the name of Bernard DiSabatino.

17. Bernard DiSabatino was the corporate nominee of Lynnebrook Apartments, Inc., as set forth in an instrument recorded February 28, 1972, in the Recorder's Office of Lancaster County in Deed Book C, Volume 62 at Page 48.

18. Attorney Frank O'Donnell (O'Donnell) represented both Bernard DiSabatino and St. Paul Title Insurance Co. at the mortgage closing referred to in finding of fact number 7.

19. Prior to the mortgage settlement Bernard DiSabatino personally handed O'Donnell tax bills (for the Lynnebrook Apartments, Inc., property) which O'Donnell paid believing he was paying the taxes on the property which is the subject of this suit.

20. The receipts for said tax payments referred to in finding of fact number 19 indicated the map number for the Lynnebrook Apartments, Inc., property and not for the subject property.

21. O'Donnell never inquired as to the title designation of the property referred to in the tax receipts.

22. In all of the communications between O'Donnell and the taxing authorities O'Donnell indicated he intended to pay taxes "for Bernard DiSabatino" without identifying the property by description and map number.

The findings of the Chancellor and the additional findings of the Court en banc suggest that two factors contributed to the misallocation of attorney O'Donnell's tax payment; i.e., (a) the failure of the Tax Claim Bureau

to have the Lynnebrook property listed in its (Lynnebrook's) own name rather than DiSabatino's and (b) the failure of attorney O'Donnell to make certain that his tax payment was being applied to the property described in the mortgage. The plaintiff, mortgagee, and the defendant purchaser being equally innocent parties the loss must be borne by the party on whom it has fallen. As between two parties having equal equities, the holder of the legal title prevails. *Linwood Harvestore, Inc. v. Cannon,* 427 Pa. 434.

Since plaintiff is arguing the equities of the case in its favor, including the inadequacy of price, we conclude that the following additional findings of fact are indicated:

ADDITIONAL FINDINGS OF FACT

23. The $1,100,000 loan by plaintiff to Bernard DiSabatino, secured by the mortgage discharged by the tax sale, was secured by a total of five mortgages, each in the amount of $1,100,000 on properties owned by DiSabatino in Lancaster County (the subject mortgage) and four other counties in Pennsylvania.

24. The $1,100,000 mortgage on the Millersville tract in Lancaster County (the subject mortgage) could have been released upon payment to plaintiff of $76,500.00.

25. The office of O'Donnell, Hughes and Lowicki, attorneys, acting as agent for Bernard DiSabatino and the St. Paul Title Insurance Company were on notice that the tax bills they were paying, being the ones handed to O'Donnell by Bernard DiSabatino, were the taxes on the tract designated under 13-J13-2-19.

26. The Tax Claim Bureau of Lancaster County had no notice or knowledge of the lien, junior to the tax claim

lien, held by First Pennsylvania Bank N. A., nor had any consideration passed between the Tax Claim Bureau and the First Pennsylvania Bank N. A. that might have placed an obligation on the Tax Claim Bureau to give First Pennsylvania Bank N. A. personal notice of the tax sale.

FINAL DECREE

And now, February 21, 1978, plaintiff's exceptions to the Chancellor's adjudication and decree nisi are dismissed except as to exception number 9 which is sustained in the following respects; i.e., plaintiff's request for findings of fact, numbers 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 25, are adopted as additional findings of fact by the Court en banc and are incorporated herein by reference. Defendant, Della Becker's exceptions are dismissed except as follows: exception number 1 is sustained and is adopted as additional finding of fact number 16; exception number 2 is sustained and is adopted as additional findings of fact numbers 18 and 19; exception number 3 is sustained and is adopted as additional finding of fact number 23; exception number 4 is sustained and is adopted as additional finding of fact number 24; exception number 5 is sustained and is adopted as additional finding of fact number 25; exception number 7 is sustained and is adopted as additional finding of fact number 26; exception number 12 is sustained, as modified by adding the word "alone" after the last word in the paragraph. Exception number 12, as modified, is incorporated herein as additional conclusion of law number 4a.

The Chancellor's adjudication and decree nisi dated November 10, 1977, as modified by the additional findings of fact and conclusion of law is incorporated herein by reference and his decree dismissing plaintiff's complaint is hereby entered as a final decree.

ADJUDICATION AND DECREE NISI OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY CIVIL—EQUITY

FIRST PENNSYLVANIA BANK

v.

LANCASTER COUNTY TAX CLAIM BUREAU

Saul, Ewing, Remick & Saul, for Plaintiff.

Herr, Kirchner, Greer & Herr, and Maurice M. Green, contra.

ADJUDICATION BY BUCHER, J., NOVEMBER 10, 1977.

This is an equity action (a) to set aside a tax sale made pursuant to the Pennsylvania Real Estate Tax Sale Law (72 P.S. 5860.101 et seq.), (b) to cancel the deed to the purchaser, and (c) to reinstate and confirm a first mortgage which was discharged by the tax sale.

ISSUES

(1) Does the Pennsylvania Real Estate Tax Sale violate the 5th and 14th Amendments of the United States Constitution by failing to require personal notice to mortgagees?

(2) Does the Act require personal notice to a mortgagee?

(3) Do equitable considerations require that the sale be set aside?

FACTS

1. Plaintiff First Pennsylvania Bank N.A. is a national banking association organized and existing under and by

virtue of the laws of the United States of America with a place of business at Centre Square, First Pennsylvania Tower, 1500 Market Street, Philadelphia, Pennsylvania. On June 3, 1974, The First Pennsylvania Banking and Trust Company was duly converted, in accordance with law, into a national banking association, the name of which is First Pennsylvania Bank N.A.

2. Defendant Lancaster County Tax Claim Bureau is a Tax Claim Bureau created under the Pennsylvania Real Estate Tax Sale Law of 1947, as amended, (hereinafter called Act) to act as agent of the various taxing districts of Lancaster County including Millersville Borough, County of Lancaster and School District of Lancaster. The Lancaster County Tax Claim Bureau has an office at 45 North Duke Street, Lancaster, Pennsylvania.

3. Defendant Della Becker is an adult individual residing at 49 Old York Road, New Hope, Bucks County, Pennsylvania.

4. The Lancaster County Tax Claim Bureau by its deed dated and recorded January 24, 1975, in the office of Recorder of Deeds of Lancaster County, Pennsylvania, in Deed Book C, Volume 66, Page 386, purported to convey the real estate described therein—namely 16,273 acres of land in Millersville Borough—to Della Becker.

5. The deed described in paragraph 4 above was executed and delivered by the Tax Claim Bureau as a result of a Tax Sale conducted on October 19, 1974, of the property of Bernard DiSabatino for the purpose of collecting real estate taxes allegedly due Millersville Borough, County of Lancaster and School District of Lancaster. The sale was approved by the Court of Common Pleas of Lancaster County as required by law and complied with all notice provisions of the Act.

6. Bernard DiSabatino purchased said real estate from Nathan Loss and Herbert S. Levy, Trustee, by deed dated February 16, 1972, recorded February 28, 1972, in the office of the Recorder of Deeds of Lancaster County in Deed Book C, Volume 62, Page 30.

7. Plaintiff was the mortgagee of a first mortgage on said property, dated April 25, 1973, given by Bernard A. DiSabatino and Joan K. DiSabatino as mortgagors in the principal amount of $1,100,000.00 which was recorded in the office for recording of deeds in Lancaster County in Mortgage Book 998, Page 869, on April 25, 1973.

8. At the Tax Sale referred to in Paragraph 5 above, defendant Della Becker bid and paid $830.08, which was equal to the upset sale price announced at the sale.

9. The fair market value of the real estate at the time of the tax sale was $185,000.00.

10. Plaintiff never received any personal notice of the tax sale.

11. DiSabatino was the sole shareholder of the Lynnebrook Apartments, Inc., which owned a tract of land in Millersville Borough adjacent to the subject property and designated in the Tax Bureau records by Map No. 13J13-19.

12. The real estate sold to Becker at the tax sale had been designated as Map No. 13J13-18.

13. Counsel for DiSabatino in connection with the closing for the loan described in Paragraph 7 above paid certain 1972 taxes on the property titled to Lynnebrook Apartments, Inc., under the mistaken belief that he was paying the taxes on which the subsequent tax sale was based.

14. The mortgage on said property described in Paragraph 7 was junior in lien to the lien of the 1972 real estate taxes on which the tax sale was based.

15. Plaintiff did not file any objections or exceptions to the confirmation nisi of the tax sale pursuant to Section 605(d) of the Tax Sale Law.

DISCUSSION

The only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales.

The Act in Section 602 provides for published notice of the sale once a week for three consecutive weeks in two newspapers of general circulation addressed to the "owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties." In Addition, certified mail notice must be given the owner and the property posted. Mortgagees are not owners under the definition set forth in Section 102 of the Act.

The Act further provides for a published notice in a newspaper of general circulation and the legal journal after the confirmation nisi of the sale and allows objections or exceptions to be filed questioning the regularity or legality of the proceeding (72 P.S. 5860.607).

Plaintiff contends that the Act offends the 5th and 14th Amendments of the United States Constitution in failing to provide for mailed notice to the mortgagee.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, it is said that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pending of the action and afford them an opportunity to present their objections."

In *Luskey v. Steffron, Inc.*, 461 Pa. 305, the Pennsylvania Supreme Court struck down Pa. R.C.P. 3129 for its failure to provide for personal notice to *owners*. The Court said: "While this type of notice [posting and newspaper publications] may have been sufficient in the time when the owners of real estate either resided on their real estate or lived in close proximity to it, such is not the situation today."

The question here, by analogy to *Luskey v. Steffron*, is: What changes, if any, have occurred in the relationship between mortgagors and mortgagees which require our holding that notice to a mortgagee must be personal? While absentee owners may require some additional due process protection we fail to see why a mortgagee cannot protect his interest with only modest efforts. In this case a subscription to the local law review and a perusal of its tax sales notices would have been sufficient to apprise the plaintiff that his security was in jeopardy. Mortgagees have always had the obligation to look after their security with respect to insurance, depreciation, waste, taxes, and liens.

Plaintiff cites *Pioneer Savings & Loan Co. v. City of Cleveland*, U.S.D.C., N.D. Ohio, No. C-69-922 for the proposition that a mortgagee must be given personal notice. However, a close reading of that case reveals that the mortgagee did not receive notice of *any* kind.

We do not believe that *First Federal Savings & Loan Assn. v. Swift*, 457 Pa. 206, is authority for the proposition that mortgagee must be given mailed or personal notice. In the course of his opinion Mr. Justice Roberts said that "notice must be given . . ." and then refers to Section 602 of the Act, cited above.

In *Franklin Federal S&L Assn. et al. v. Yocum et al.*, 30 Fayette L.J. 125, it was held that if notice has been

properly given to the owner a mortgagee may not complain that he did not, as agent of the delinquent taxable or property owner, receive notice.

Plaintiff concedes that mere inadequacy of price is an insufficient basis for setting aside the tax sale but contends that defendant Della Becker's son appeared at the sale and announced that the sale was subject to a substantial mortgage. Plaintiff contends that this discouraged active bidding to plaintiff's detriment. We have no basis for finding that any false representation was made by Della Becker's son and, in any event, there is nothing in the record to indicate that any prospective purchaser was deceived by any statement made by him. In short, we find no equitable basis for overturning the sale. Indeed, as Mr. Justice Roberts said in *First Federal S&L Assn. v. Swift*, above, "When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle that right. Equity follows the law."

For the foregoing reasons we believe that the Pennsylvania Real Estate Tax Sale Act is constitutional and does not offend the 5th and 14th Amendments to the United States Constitution.

Conclusions of Law

1. The Pennsylvania Real Estate Tax Sale Act (72 P.S. 5860.101 et seq.) is constitutional.

2. Plaintiff, mortgagee, was not denied due process of law in connection with the sale of real estate which resulted is the discharge of its mortgage lien.

3. Plaintiff was not entitled to personal or mailed notice of the tax sale.

4. There are not equitable considerations which justify setting aside the sale.

5. Plaintiff's complaint must be dismissed.

DECREE NISI

And now, November 10, 1977, plaintiff's complaint is dismissed.

If no exceptions are filed within ten days after notice of filing of this adjudication a final decree shall be entered by the Prothonotary on praecipe.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU
and DELLA BECKER

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

By THE COURT:

/s/ MARLENE F. LACHMAN
Marlene F. Lachman, Esq.
Prothonotary

Dated: May 19, 1982

STATUTES INVOLVED

72 P.S. § 5860.602 Notice of sale

Prior to any scheduled sale the bureau shall give notice thereof, once a week for three (3) consecutive weeks in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (a) the purposes of such sale, (b) the time of such sale, (c) the place of such sale, (d) the terms of the sale including the approximate upset price, (e) the descriptions of the properties to be sold as stated in the claims entered, each description commencing with

"
.....
Name of Owner

.....
description"

Where the owner is unknown and has been unknown for a period of not less than ten years, the name of the owner need not be included in such description.

The description may be given in intelligible abbreviations.

Such published notice shall be addressed to the "owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties".

In addition to such publications, similar notice of the sale shall also be given by the bureau, at least ten (10) days before the date of the sale, by United States registered mail, personal addressee only, return receipt re-

quested, postage prepaid, to each owner as defined by this act [1] and by posting on the property.

The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the date of sale enters into an agreement with the bureau to pay the taxes in instalments, in the manner provided by this act, and the agreement entered into.

In case the property of any corporation, limited partnership or joint-stock association is advertised for sale, the bureau shall give to the Department of Revenue the notice required by section one thousand four hundred two of the Fiscal Code of the ninth day of April, one thousand nine hundred twenty-nine (Pamphlet Laws 343).[2]

No sale shall be defeated and no title to property sold shall be invalidated because of proof that mail notice as herein required was not received by the owner, provided such notice was given as prescribed by this section.

72 P.S. § 5860.609 Certain liens divested by sale

Every such sale shall discharge the lien of every obligation, claim, lien or estate with which said property may have or shall become charged, or for which it may become liable, except no such sale shall discharge the lien of any ground rent or mortgage which shall have been recorded before such taxes became liens, and which is or shall be prior to all other liens, except other mortgages and ground rents. 1947, July 7, P.L. 1368, art. VI, § 609.

1. Section 5860.101 et seq. of this title.

2. Section 1 et seq. of this title.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 6, 1982)

Notice is hereby given that First Pennsylvania Bank, N.A., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, (entered May 19, 1982) dismissing plaintiff's appeal as having been improvidently granted, thereby sustaining the validity of the trial court's decision that the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. § 5860.101 *et seq.*, on its face and as applied to appellant herein complied with the Fifth and Fourteenth Amendments to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WHITE AND WILLIAMS

Attorneys for Appellant,
First Pennsylvania Bank, N.A.

By /s/ RICHARD M. SHUSTERMAN
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Philadelphia, PA 19107
(215) 854-7078

IN THE
COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. 361 October, 1979, A.D.
No. 800 October, 1979, J.D.

RE: UPSET SALE, TAX CLAIM BUREAU OF BERKS COUNTY, PENNSYLVANIA, HELD ON SEPTEMBER 10 and 11, 1979—OBJECTIONS AND EXCEPTIONS OF ESTATE OF MARY C. SCHUMO, DECEASED.

Clinton J. Najarian, Esquire, and C. Thomas Work, Esquire, for Objectant/Exceptant

James A. Cunningham, Esquire, for Respondents

Argued before Eshelman, P.J. and Schaeffer, J., on September 2, 1980.

OPINION

SCHAEFFER, *J.* July 16, 1982.

On September 10, 1979, the Berks County Tax Claim Bureau sold property of Annabella D. Mosser [1] at public auction pursuant to the Real Estate Tax Sale Law.[2] Roland S. Nolf and Louella V. Nolf, his wife, were the successful

1. The property is located in Robeson Township, Berks County, Pennsylvania, and is more fully described in Deed Book Volume 1699, at page 573, etc.

2. Act of July 7, 1947, P.L. 1368, No. 542, as amended; 72 P.S. 5860, 101 et seq.

purchasers at the sale, bidding the upset price of $3,378.56.[3]

On October 31, 1979, the Tax Claim Bureau filed its consolidated return for the tax sales of September 10 and 11, 1979, including the sale of the Mosser property. On the same day, the Berks County Court of Common Pleas entered a decree nisi confirming these sales, again including the sale of the Mosser property.

At the time of the September 10, 1979 sale, the Estate of Mary C. Schumo was a judgment creditor of Annabella D. Mosser holding several judgment liens against the property sold at tax sale.

On November 14, 1979, the Schumo Estate filed objections and exceptions to the September 10th sale of the Mosser property and caused a rule to be issued upon the Tax Claim Bureau, the Nolfs, and Annabella D. Mosser, to show cause why the tax sale of the property should not be invalidated, set aside and rescinded. The rule was returnable January 7, 1980 and was extended to January 17, 1980.

On January 17, 1980, Annabella D. Mosser consented to the Schumo request and, accordingly, the court entered an order making the rule absolute as to her only.

The Schumo Estate alleged, *inter alia*, in its objections and exceptions that it had not received notice, either written or oral, prior to the September 10, 1979 sale, and that, therefore, the sale was invalid as to the Estate.

On August 1, 1980, the Schumo Estate filed a motion for summary judgment, which motion is now before us.[4]

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3. Deposition of Thomas Rose, May 2, 1980, page 6.

4. Strictly speaking, Pa. R.C.P. 1035 relating to Summary Judgment does not apply to this proceeding. The Rule is applicable only to Assumpsit actions and to such other actions which apply the Assumpsit Rules by reference. The present action is under the Real Estate Tax Sale Act and the procedures under that

The record in the case at bar is clear that the Tax Claim Bureau did not give the Schumo Estate any direct notice of the tax sale whatsoever. Furthermore, there is no evidence that the Estate had actual notice of the sale. However, the Tax Claim Bureau did advertise the tax sale in the Reading Eagle and Reading Times on August 18, 25 and September 1, 1979. The same notice was also advertised in the Berks County Law Journal on August 30, 1979, in accordance with the requirements of section 602 of the Real Estate Tax Sale Law.[5] The advertisement was addressed to the "Owners of properties described in this notice and to all persons having *tax* liens, *tax* judgments, or *municipal* claims against such properties." (Emphasis supplied)

This published notice was the only notice which the Tax Claim Bureau gave or, under the Real Estate Tax Sale Law, was required to give.

The Schumo Estate does not dispute that the sale was held in accordance with the applicable law. Rather, it argues that the Real Estate Tax Sale Law is unconstitutional insofar as it deprives lien creditors of notice, and thus deprives them of a valuable property right, i.e., their liens, without due process of law. We agree.

Before tackling this issue directly, a brief historical review of the applicable law is enlightening. Prior to the

4. (Cont'd.)

Act are not governed by the Assumpsit Rules. Rather, the Act, itself, in section 607, 72 P.S. 5860.607, provides that objections or exceptions shall be "disposed of according to the practice of the court." The Berks County Court of Common Pleas has no local rule providing for the handling of objections or exceptions to a decree *nisi* in a case of this kind. However, we find it appropriate to consider this case on the record before us, including the deposition taken, as this is in accordance with the practice of our court.

5. Act of July 7, 1947, P.L. 1368, Art. VI, Section 602, as amended; 72 P.S. 5860.602.

adoption of the Real Estate Tax Claim Law, delinquent tax claims could be enforced pursuant to the provisions of the Act of May 16, 1923.[6]

This prior law provided for an upset sale similar in many respects to the upset sale authorized by Section 602 of the Real Estate Tax Claim Act of 1947, but significantly different in one important aspect. The Act of 1923 provided that advertisement of the sale should be made by the sheriff addressed to persons having tax liens, tax judgments or municipal claims, as in other real estate sales by the sheriff, which meant that a non-municipal claim lien creditor received no notice of the sale. However, under the Act of 1923, a purchaser at an upset sale acquired the property subject to all liens, including mortgage and judgment liens, excluding only tax and municipal claims. Therefore, under the Act of 1923, a private judgment creditor did not have his lien affected by a tax upset sale, the upset sale could not deprive him of a property right and, therefore, no notice to him was required.

Significantly, the Real Estate Tax Sale Law of 1947 provided that the upset sale shall divest the lien of "every obligation, claim, lien or estate with which said property may have or shall become charged or for which it may become liable, except no such sale shall discharge the lien of any ground rental mortgage which shall have been recorded before such taxes became liens and which is or shall be prior to all other liens, excepting other mortgages and ground rents."[7]

Thus, the Real Estate Tax Claim Sale Act of 1947 attempts to divest the lien of a judgment creditor, but provides for no notice addressed to a judgment creditor.

6. Act of May 16, 1923, P.L. 207, Section 1 et seq; 53 P.S. Section 7101, et seq.

7. Act of July 7, 1947, P.L. 1368, Section 609; 72 P.S. 5860.609.

In short, the effect of an upset sale under the Act of 1947 is substantially different than the effect of the upset sale under the Act of 1923, but the notice requirements are basically the same.

It is fundamental to the law of this Commonwealth and of the United States that no man's property can be taken from him without due process of law. A judgment lien is a valuable property right. In re *Pennsylvania Central Brewing Co.*, 114 F. 2d 1010, 1013 (3rd Cir. Ct. of Appeals, 1940). As such it can not be taken or destroyed without due process of law. Due process of law inherently requires that a person be given notice of any proceeding that would take from him his property and give him an opportunity to defend or take such other steps as he may deem proper to preserve and protect his property.

The Supreme Court of the United States in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 Sup. Ct. 652, 94 L. Ed. 865 (1950) has set down certain general principles regarding the sufficiency of notice. Mr. Justice Jackson, speaking for the court, said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted) The notice must be of such nature as reasonably to convey the required information." (Citations omitted)

The Appellate Courts of Pennsylvania have interpreted *Mullane* to require that before there can be a deprivation of property rights, notice must be "reasonable under the circumstances." *Hess v. Westerwick*, 366 Pa. 90, 97; 76 A.2d 745, 748 (1950); *Pagni v. Commonwealth*, 179 Pa. Super. 213, 218; 116 A.2d 294, 296 (1955).

The notice given in the present case was not directed or addressed to the person whose rights were affected. An alert judgment creditor who followed every legal notice published would have had no cause to read the notice here given. We find it was not reasonable under the circumstances. Cf. *Commonwealth v. DePofi*, 362 Pa. 229, 66 A.2d 649 (1949).

Therefore, while notice given by publication only may meet minimal due process requirements when addressed correctly, publication of notice addressed to persons other than the Schumo Estate did not give the Schumo Estate adequate notice of the upset sale.

We say this being aware of the case of *1st Pennsylvania Bank v. Lancaster County Tax Claim Bureau*, 66 Lancaster L.R. 247 (C.P. of Lancaster Co., Pa. 1977) in which the Lancaster County Court held a notice identical in its address, wording, and manner of publication to the notice in the case at bar, sufficient as to a non-tax, non-municipal lien creditor. A reading of that case, however, shows that the Lancaster Court held notice by publication in a situation of the type in the case at bar sufficient. The Lancaster Court did not discuss or consider the adequacy of the address set forth in the notice nor whether the address was sufficient to alert the lien holder and impose upon it the duty to read the notice in full. Therefore, while the Lancaster County Court held the notice good as to a non-tax, non-municipal lien holder, it did not address the issue presented to us in the case at bar.

The Commonwealth Court affirmed the Lancaster County decision in a brief opinion. *1st Pennsylvania Bank v. Lancaster County Tax Claim Bureau*, 44 Pa. Commonwealth Ct. 301, 404 A.2d 709 (1979), again without considering the issue presented in the case at bar. Finally, the Supreme Court dismissed an appeal to it from the Commonwealth Court as improvidently granted, again without addressing the issue before us.

We are of the Opinion that *1st Pennsylvania* was decided on other grounds by the appellate courts, that the issue before us has not been ruled on by them, and that we are not governed by *1st Pennsylvania, supra,* in the circumstances presented.[8]

Accordingly, we enter the following order:

ORDER

AND NOW, TO WIT: This 16th day of July, 1982, the rule issued by this court on November 14, 1979 is made absolute, the tax sale of the property of Annabella D. Mosser held on September 10, 1979, to No. 43-74 is adjudicated, invalid and is set aside, and the liens of the Estate of Mary C. Schumo, deceased, on said property remain unaffected by said tax sale.

By THE COURT:

/s/ PAUL H. SCHAEFFER, *J.*

8. The parties entered into a stipulation requesting us to withhold our decision until after the Supreme Court has acted in *1st Pennsylvania,* in the hope that the Supreme Court in its decision in that case would consider the issue before us in the case at bar. Accordingly, we withheld our opinion in this matter until the Supreme Court had acted.

NO. 82-268

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

On Appeal from the Supreme Court of the
Commonwealth of Pennsylvania

MOTION OF APPELLANT FIRST PENNSYLVANIA BANK, N. A.,
TO DEFER CONSIDERATION OF ITS JURISDICTIONAL STATEMENT

First Pennsylvania Bank, N.A., Appellant in No. 82-268, requests that the Court defer consideration of its Jurisdictional Statement until such time as the Court rules on the appeal in Mennonite Board of Missions, Inc. vs. Adams, 427 N.E. 2d. 686 (Ind. Ct. App. 1981), prob. juris. noted, No. 82-11, (U.S. Sup. Ct., October 12, 1982). The reasons for this request are:

1. The instant appeal, and the appeal in Mennonite Board of Missions, Inc. vs. Adams raise identical issues as to the constitutionality of state pre-tax sale notice statute provisions that do not provide for adequate due process notice to a mortgagee of an impending tax sale which has the effect of divesting the mortgagee of a valuable recorded mortgage, such notice statutes thus being repugnant to the Fifth and Fourteenth Amendments of the United States Constitution.

2. The Indiana and Pennsylvania state pre-tax sale notice statutes both provide that, with respect a mortgagee, the name and address of which is a matter of public record, notice of

an impending tax sale which has the effect of divesting the mortgagee of its valuable recorded mortgage need only be posted and published and need not be mailed to such mortgagee. Ind. Code §6-1.1-24-3 (1976); 72 Pa. Cons. Stat. Ann. §5860.602 (Purdon 1968).

3. Under both the Indiana and Pennsylvania statutes, only owners of the real property upon which delinquent taxes are owing must be provided with notice by mail of an impending tax sale. Ind. Code §6-1.1-24-4 (1976); 72 Pa. Cons. Stat. Ann §5860.602 (Purdon 1968).

4. This Court noted probable jurisdiction in Mennonite Board of Missions, Inc. vs. Adams, No. 82-11, on October 12, 1982, and scheduled the case for full briefing and oral argument.

5. Because of the identity of the issues involved, Appellant First Pennsylvania Bank, N.A., respectfully suggests that the Court defer action on Appellant's Jurisdictional Statement until the Court rules on the merits on the appeal in Mennonite Board of Missions, Inc. vs. Adams, No. 82-11.

Respectfully submitted,

RICHARD M. SHUSTERMAN
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Attorneys for Appellant

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Philadelphia, PA 19107

NO. 82-268

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

---

CERTIFICATE OF SERVICE

I hereby certify that I this day served the foregoing Motion to Defer Consideration of Appellant's Jurisdictional Statement upon the parties below, at the addresses indicated, by first-class United States mail, postage pre-paid, pursuant to U.S. Sup. Ct. Rules 28.3 and 28.4(c). I hereby further certify that all parties required to be served have been served hereby, in accordance with U.S. Sup. Ct. Rule 28.5.

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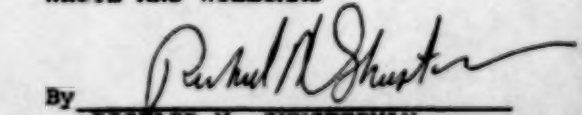
By 
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DATED: October 22, 1982

Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-268

In The

Supreme Court of the United States

October Term, 1982

FIRST PENNSYLVANIA BANK, N.A.,
Appellant,

vs.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee,

-and-

DELLA BECKER,
Appellee.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether appellant's federal question was properly raised or expressly passed on by the Supreme Court of Pennsylvania?
2. Whether the identical case is still pending in the United States District Court for the Eastern District of Pennsylvania?
3. Whether the federal question of appellant is substantial?
4. Whether the Decree of the Supreme Court of Pennsylvania rests on an adequate non-federal basis?

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STATUTES AND PROCEDURAL RULES INVOLVED

DEFICIENCY JUDGMENT ACT

The Pennsylvania Deficiency Judgment Act of July 16, 1941, P.L. 400, 12 P.S. Sec. 2621.1 *et seq.* provides in the pertinent parts:

> "The title is as follows: 'An Act to protect the debtors, obligors or guarantors of debts for which judgments are entered or may be entered, and owners of real property affected thereby, and others indirectly liable for the payment thereof, by prescribing the method of fixing the fair market value of such property sold on execution, and limiting the amount collectible thereafter on such judgments.'"

Sec. 2621.1 Plaintiff to petition court to fix value of real property sold

> "Whenever any real property has heretofore been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment, interest and costs and the plaintiff seeks to collect the balance due on said judgment, interest and costs, the plaintiff or plaintiffs shall petition the court having jurisdiction to fix the fair market value of the real property sold as aforesaid. Said petition shall be signed and sworn to by the plaintiff or plaintiffs." 1941, July 16, P.L. 400 Sec. 1.

Sec. 2621.7 Time for filing petition

"The plaintiff or plaintiffs shall file all petitions in accordance with section one and section two of this act not later than six months after the sale of any real property. In the event no petition is filed within such period, the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff or plaintiffs." 1941, July 16, P.L. 400, Sec. 7.

Sec. 2621.7a Proceedings when petition not filed; marking judgment satisfied

"If the plaintiff or plaintiffs shall fail to present such petition to fix the fair market value of the real property sold within six months after the sale of such real property as provided by this act, the debtor, obligor, guarantor or any other person liable directly or indirectly to the plaintiffs or plaintiffs for the payment of the debt, or any person or persons interested in any real estate which would, except for the provisions of this act, be bound by said judgment, may present his or their petition to the court having jurisdiction, setting forth the fact of said sale, and that no petition has been filed within six months after said sale to fix the fair market value of the property sold, whereupon the court, upon proof of service of at least ten days' notice of said petition on the plaintiff or plaintiffs, or their attorney in said action, and being satisfied of such facts, shall direct the prothonotary to mark said judgment satisfied, released and discharged." 1941, July 16, P.L. 400, Sec. 7.1, added 1943, May 27, P.L. 681, Sec. 1.

The Pennsylvania Deficiency Judgment Act of July 16, 1941, P.L. 400, 12 P.S. Sec. 2621.1 *et seq.*, was substantially reenacted in the Pennsylvania Judiciary and Judicial Procedure Act of July 9, 1976, P.L. 588, 42 Pa. C.S.A., Sec 8101 *et seq.*

Pa. R.C.P. 235

Pennsylvania Rule of Civil Procedure 235 provides as follows:

> **Rule 235. Notice to Attorney General. Constitutionality of Statute**
>
> "In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice." Adopted Nov. 30, 1964. Eff. June 1, 1965.

SUPREME COURT RULE 28.4.(c)

Revised Supreme Court Rule 28.4.(c) provides as follows:

> "In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer or employee thereof is not a party, the initial pleading, motion or paper in this Court shall recite that 28 U.S.C. Sec. 2403(b) may be applicable and shall be served upon the Attorney General of the State."

MOTION TO DISMISS APPEAL

Pursuant to Rule 16.1.(b) of the Revised Rules of this Court, Della Becker, appellee, moves that this appeal be dismissed.

STATEMENT OF THE CASE

First Pennsylvania Bank appeals from the Decree of the Supreme Court of Pennsylvania, which dismissed its appeal as having been improvidently granted. Appellant challenges the constitutionality of the Pennsylvania Real Estate Sale Tax Law which divested its mortgage from a tract of land purchased by Della Becker at a Lancaster County tax sale.

In 1973, Bernard DiSabatino, a commercial builder, borrowed $1,100,000. from First Pennsylvania Bank and gave, as security for the loan, five $1,100,000. mortgages, each covering a separate tract in four counties in Pennsylvania, all securing the identical note. At the mortgage settlement, the St. Paul Title Insurance Company attorney, as agent for First Pennsylvania Bank, was to pay the delinquent real estate taxes.

Appellant believed, as a consequence, that its mortgage would be a senior lien. In error, the attorney paid the taxes due on another tract of land. The delinquent taxes on DiSabatino's tract went unpaid, becoming a senior lien superior to appellant's mortgage.

In 1974, after giving full statutory notice, the Lancaster County Tax Claim Bureau sold the subject tract to Della Becker at a public auction. As the tax lien was senior to appellant's junior mortgage, the tax sale divested its junior mortgage by operation of a provision of the Real Estate Tax Sale Law, 72 P.S. Sec. 5860.609. Neither Lancaster County nor the Commonwealth had any knowledge or notice of appellant's mortgage, as there was no duty imposed on government to keep track of liens held by private parties, such as First Pennsylvania Bank. In general, Pennsylvania law does not require senior lien holders to notify junior lien holders prior to a judicial sale divesting the junior lien, whether it be a tax sale or a Sheriff's sale on execution or foreclosure.

Thereafter, Bernard DiSabatino defaulted on his loan from First Pennsylvania Bank. Appellant then foreclosed its other three mortgages on the other three tracts in the other three Pennsylvania counties, all securing the one and the same debt. However, appellant neglected to file deficiency judgment petitions after each of the three Sheriff's sales. As a consequence of appellant's neglect, operation of the Deficiency Judgment Act caused its mortgage to be discharged.

Thus, appellant's mortgage was initially divested by operation of the Real Estate Tax Sale Law, but subsequently discharged by operation of the Deficiency Judgment Act. As its mortgage was discharged, appellant no longer had any interest remaining in Della Becker's tract of land.

Appellant joined the Lancaster County Tax Claim Bureau and Della Becker, but not the Commonwealth of Pennsylvania, when it brought suit in the Lancaster County Court of Common Pleas. However, appellant failed to give notice to the Pennsylvania Attorney General as required by Pa. R.C.P. 235. After losing at

trial, at the court sitting en banc, and at the Commonwealth Court of Appeals, appellant appealed to the Supreme Court of Pennsylvania. Whereupon, Della Becker brought her Petition and Motion To Quash Appeal on the ground that operation of the Deficiency Judgment Act had paid and discharged appellant's mortgage, and thus, the bank lacked standing to appeal. The Supreme Court of Pennsylvania dismissed appellant's appeal as having been improvidently granted.

Moreover, appellant's constitutional challenge itself had not been properly raised or expressly passed on by the Supreme Court of Pennsylvania, because appellant had failed to give notice to the Pennsylvania Attorney General as required by Pa. R.C.P. 235 when it initially filed suit. Appellant never rectified its error in the state appellate courts. Appellant has, however, underscored and amplified its error by its present failure to comply with Rule 28.4.(c) of this Court.

Appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was deemed abandoned for failure to comply with Pa. R.C.P. 235. In

addition, the Supreme Court of Pennsylvania might well have dismissed appellant's appeal on the adequate non-federal basis of lack of standing, or mootness, as its mortgage had been discharged by the Deficiency Judgment Act, and any claim under such a satisfied mortgage was moot.

ARGUMENT

1. APPELLANT'S FEDERAL QUESTION WAS NOT PROPERLY RAISED OR EXPRESSLY PASSED ON BY THE SUPREME COURT OF PENNSYLVANIA.

Appellant filed suit in equity in the Lancaster County Court of Common Pleas against the appellees herein, but chose not to join the Commonwealth of Pennsylvania. The complaint challenged the constitutionality of the Pennsylvania Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, No. 542, Act I, Sec. 101, *et seq.*, as amended, 72 P.S. Sec. 5860.101 *et seq.* In such proceedings, Pennsylvania Rule of Civil Procedure 235 required appellant to give notice to the Pennsylvania Attorney General and file proof of same. The Lancaster County docket entries contain no such proof.

In Pennsylvania, the notice requirement of Pa. R.C.P. 235 is mandatory, *McIlwain* v. *McIlwain*, 27 Somerset 352, (1971) and the proper way to challenge the constitutionality of a Pennsylvania statute is to

plead the issue and give notice to the Attorney General as required by Pa. R.C.P. 235. Where plaintiff fails to do so the issue of constitutionality is abandoned or waived. *Irrera v. S.E.P.T.A.*, 231 Pa. Superior Ct. 508, 331 A. 2d. 705 (1974), *Superior Mining Company Property Tax Sale*, 359 Pa. 357, 59 A. 2d 301 (1948). When plaintiff fails to comply with Pa. R.C.P. 235, Pennsylvania courts will not hear an argument that a Pennsylvania statute is unconstitutional. *Speece v. Lebanon Parking Authority*, 65 D. & C. 2d 408 (1974).

Pa. R.C.P. 235 is a sound procedural rule, for the validity of the Commonwealth's laws should not be placed exclusively in the hands of private litigants. Constitutional questions are more than matters of private concern between parties; they are matters of the public interest. As to the reasonableness of Pa. R.C.P. 235, this Court has the similar Revised Rule 28.4.(c), and a similar provision was enacted by the Congress with respect to proceedings before three-judge courts involving the constitutionality of a federal statute: Act of June 25, 1948, 28 USCS Sec. 2284.

If the Supreme Court of Pennsylvania dismissed appellant's appeal sua sponte for failure to comply with Pa. R.C.P. 235, the case stands as though no appeal had been presented from the judgment rendered by the trial court. *Newman v. Gates*, 204 U.S. 89 (1907).

As a basic rule, federal claims must be presented to state courts in accord with state procedure. It would appear that the Supreme Court of Pennsylvania recognized appellant's failure to have properly raised its federal question by dismissing its appeal as improvidently granted.

2. THE IDENTICAL CASE IS STILL PENDING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

As well as filing in the Lancaster County Court of Common Pleas, appellant simultaneously filed its complaint in the United States District Court for the Eastern District of Pennsylvania at No. 75-1858. The federal complaint is the same as the Lancaster County complaint at issue here including the federal claims. The United States District Court has refrained from deciding the case until the state courts had decided it.

Now, in effect, appellant has brought its case to this Court before it has been decided by the Federal courts below.

3. THE FEDERAL QUESTION IS NOT SUBSTANTIAL.

Appellant questions the right of the Tax Claim Bureau to proceed with a tax sale in the absence of personal notice to junior creditors whose security may be in jeopardy. Appellant cites *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950) for its argument that published notice to junior creditors in simply inadequate due process. Factually, *Mullane* pitted trust beneficiaries, who in effect were part owners of the trust and entitled to notice as owners, against a trustee bank who notified them only by publication. However, the names and addresses of the beneficiaries were readily at hand. Published notice alone was insufficient because the state interest in concluding trusts did not outweigh the ownership interest of the beneficiaries, and due process necessitated personal notice to the beneficiaries. Here, the facts are different. The owner of the property, Bernard

DiSabatino, received personal notice of the impending tax sale by certified mail, posting and publication. His lien creditors were notified by posting of the property and publication, but not personally, because the Pennsylvania legislature chose not to place such additional burdens on county government. It must be noted that the names and addresses of such lien creditors can be ascertained only by a thorough title search, and thus are not readily at hand.

Where there is a valid governmental interest at stake, due process tolerates less than actual, personal notice. *Boddie* v. *Connecticut*, 401 U.S. 371 (1979), *Phillips* v. *Commissioners*, 238 U.S. 583 (1931), *Hamilton* v. *United States*, 309 F. Supp. 468 (S.D.N.Y., 1969).

This Court decided that even junior federal liens could be properly divested by a Sheriff's sale in Pennsylvania without notice to the United States. *U.S.A.* v. *Brosnan*, 363 U.S. 237 (1960). Congress had to enact remedial legislation to protect junior federal liens; the Pennsylvania legislature has never seen fit to so protect private junior lien creditors in Pennsylvania.

Appellant later lost another of its mortgages in another Pennsylvania county and brought a similar mortgage divestiture case, *First Pennsylvania Bank N.A. v. Counties Investment Corporation*, Civil Action No. 76-3401, in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of the same provision of the Pennsylvania Real Estate Tax Sale Law as here. They lost. Squaring the Pennsylvania Real Estate Tax Sale Law with *Mullane*, Judge Newcomer stated:

> "Here, where the statutory scheme not only provides notice of tax delinquency, but also provides a mechanism for completely avoiding state action, this Court holds that due process is served. To hold otherwise, and to require mailed notice to mortgagees prior to a sale, would place an intractable burden on the taxing authorities. For each property, the record would have to be fully searched. The Court believes that such a title search, which is a normal concommittant of a mortgage transaction, is more properly done by the mortgagee, which can include its administrative costs in the mortgage agreement. There does not seem to be any reason, in light of the statutory protections built into the Tax Law, to shift this burden. Therefore, the plaintiff's attack on the Tax Sale Act as constitutionally deficient must fail."

Appellant should have taken care to protect its lien, for as Chief Justice Marshall put it, "It is the part of common prudence for all those that have interest in a thing to guard that interest by persons who are in a situation to protect it." *The Mary*, 9 Cranch. 126, 144. The burden of care should be on the lien creditor, not on government.

Chancellor Bucher, in the instant Lancaster County case, found that:

> "In this case a subscription to the local law review and a perusal of its tax sales notices would have been sufficient to appraise the plaintiff that his security was in jeopardy. Mortgagees have always had the obligation to look after their security with respect to insurance, depreciaton, waste, taxes and liens.

This Court recently decided a "notice" case in favor of the use of the mails. *Greene v. Lindsay*, 102 S. Ct. 1874 (1982). There, the names and addresses of tenants were readily at hand. Here, the names and addresses of lien creditors are not readily available, and local government must bear the substantial expense of conducting a full title search of the property of each delinquent taxpayer in order to discover junior lien

creditors before proceeding to sell such property. The valid, compelling necessity of Lancaster County to collect taxes efficiently must prevail over the interests of those junior creditors with liens on the real estate of tax delinquents.

4. THE DECREE OF THE SUPREME COURT OF PENNSYLVANIA RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellee filed, briefed and orally argued her Petition and Motion To Quash Appeal in the Supreme Court of Pennsylvania, presenting the ground that appellant's mortgage was discharged by operation of the Deficiency Judgment Act and thus, appellant lacked standing to appeal, for a claim under such a satisfied mortgage was moot.

Appellant had completely foreclosed on the three other DiSabatino mortgages, all securing the one and the same debt, before this Lancaster County appeal had even been brought to the Supreme Court of Pennsylvania. The docket entries of Lehigh County, Berks County and Delaware County, where the other three secured properties and mortgages were located,

reveal that appellant neglected to ever file its deficiency judgment petitions.

The Supreme Court of Pennsylvania, in interpreting the effect of the Deficiency Judgment Act, laid down the principle that unless a petition is filed to fix the fair market value of a property, sold by the Sheriff on a mortgage, within six months of the sale, the underlying debt was considered paid and discharged, even where the creditor still held other mortgages on other properties as security for the same debt. *Union Trust Company of New Castle* v. *Totino*, 353 Pa. 145, 44 A. 2d. 556 (1945).

The Deficiency Judgment Act treats the purchase of the mortgaged premises by an execution creditor at the Sheriff's sale as a payment of the debt due him, just as if he had then received the amount in cash. *Pennsylvania Company* v. *Scott*, 346 Pa. 13, 29 A. 2d. 328 (1942). Pennsylvania courts have held that the Deficiency Judgment Act is to be liberally construed to aid judgment debtors, and, in turn, persons indirectly affected by the judgment. *Western Flour Company* v.

Alosi, 216 Pa. Superior Ct. 341, 264 A. 2d 413 (1970), *Grimes* v. *Grimes*, 216 Pa. Superior Ct. 346, 264 A. 2d 410 (1970).

The effect of the Deficiency Judgment Act is to cause the judgment to be satisfied by the foreclosure and sale if the creditor fails to proceed according to the statute. *Kokosh* v. *F.S. & L.A.*, 118 P.L.J. 406, (1970). In the most recent Pennsylvania case on this issue, the principle was reiterated that where the mortgage holder buys the mortgaged premises in at the Sheriff's sale, but fails to file the petition under the Act to fix the value thereof, there is an irrebuttable presumption that the entire debt was paid in full. *Appeal of John McShain Charities, Inc.*, 48 Commonwealth Ct. 144, 409 A. 2d. 923 (1978).

As DiSabatino's debt, note and judgment to appellant were deemed paid, appellant's Lancaster County mortgage was discharged. Appellant thus has no constitutionally protected property or entitlement interest upon which it may base a challenge of constitutional deficiency in the notice provisions of the Pennsylvania

Real Estate Tax Sale Law, since its mortgage on the subject tract was discharged by operation of the Deficiency Judgment Act. Appellant's federal claim is moot.

CONCLUSION

Although the Supreme Court of the Commonwealth of Pennsylvania delivered no opinion, it appears that their judgment might well have rested upon non-federal grounds, and thus, this Court ought not to take jurisdiction. *Stembridge* v. *State of Georgia*, 343 U.S. 541 (1952). This Court is without jurisdiction when the question of the existence of an adequate state ground is debatable. *Bachtel* v. *Wilson*, 204 U.S. 36 (1907).

For all the foregoing reasons, appellee moves that this appeal be dismissed.

Respectfully submitted,

Heywood Eric Becker, Esq.
Maurice M. Green, Esq.

Attorneys for Appellee,
Della Becker

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIRST PENNSYLVANIA BANK N.A.	:	CIVIL ACTION
v.	:	
LANCASTER COUNTY TAX CLAIM BUREAU	:	
&	:	
DELLA BECKER, et al.	:	NO. 75-1858

COMPLAINT

Count 1

1. This action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States and the United States Code, Title 42, Sec. 1983 to redress the deprivation, under color of state statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured to plaintiff. The jurisdiction of this Court under Count 1 is invoked under United States Code, Title 28, Sec. 1331 and Sec. 1343 and the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

. . .

(Paragraphs 2-19 deal with non-federal claims, are not here relevant, and have been omitted for brevity.)

. . .

20. The statute authorizing the Tax Sale of real estate without prior notice to a mortgagee or judgment

creditor Pennsylvania Real Estate Tax Sale Law, 72 P.S. Sec. 5860.101 *et seq.* and particularly sec. 602 thereof, 72 P.S. Sec. 5860.602, is unconstitutional as applied to the plaintiff herein, in that it authorizes the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, Plaintiff prays . . .

Lancaster County Docket Entries

State of Pennsylvania, } ss.:
County of Lancaster, }

Among the Records *entered in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, in* _____
Equity No. 16, Page 242
*Term*_____ *No.* _____ *is contained the following:*

Docket-Entries:

1. July 8, 1975 Praecipe filed issue Summons In Equity. (1 page)

2. July 11, 1975 I, Sheriff of Lancaster County, Pa. deputize the Sheriff of Bucks County, to execute this writ. Frederick B. Plowfield (2 pages)
August [illegible] 1975 Served Summons on Della Becker, defendant, by handing copy to Haywood Becker, son, at 40 Old York Road, New Hope, Penna.
So answers John P. Mitchell, Sheriff of Bucks County, Pa.

July 14, 1975 Served Summons on Lancaster County Tax Claim Bureau, defendant, by handing copy to Dorothy E. Hogarth, Director, at 45-47 North Duke Street, Lancaster, Penna.

July 14, 1975 Served Summons on County of Lancaster, defendant, by handing copy to Raymond Harr, Commissioner, at 51 East King Street, Lancaster, Penna.

July 14, 1975 Served Summons on School District of Lancaster, defendant, by handing copy to Dr. C. R. Walker, Superintendent, at 233 West Orange Street, Lancaster, Penna.

July 15, 1975 Served Summons on Millersville Borough, defendant, by handing copy to Janet Ruby, Borough Manager, at 25 East Charlotte Street, Millersville, Penna.
So answers Frederick B. Plowfield, Sheriff of Lancaster Co., Pa.

3. October 6, 1975 Enter Rule upon Plaintiff in the above captioned matter to file a Complaint.
Brubaker & Brubaker
By: Harry St. C. Garman
Attorney of Defendant, School District of Lancaster

AND NOW, October 6, 1975, a rule is entered as above directed.
Robert M. Reed, Prothonotary

4. October 9, 1975 Acceptance of service of the rule to file a Complaint filed. (1 page)

5. October 14, 1975 Complaint filed. (9 pages)

6. October 17, 1975 Praecipe filed entering the appearance of Brubaker and Brubaker for the defendant, School District of Lancaster. (1 page)

7. October 17, 1975 Acceptance of service of the plaintiff's complaint filed. (School District of Lancaster) (1 page)

8. October 17, 1975 Preliminary Objections filed by School District of Lancaster. (1 page)

9. October 21, 1975 Preliminary Objections filed by County of Lancaster. (1 page)

October 22, 1975 Affidavit of service of Plaintiff's Complaint filed. (1 page.

October 22, 1975 Affidavit of service of Preliminary [illegible] of School District of Lancaster [illegible]

[illegible] Affidavit of service of [illegible]

State of Pennsylvania, }
County of Lancaster, } ss.:

Among the Records *entered in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, in* _____
Equity No. 16, Page 242
Term, _____ *No.* _____ *is contained the following:*

Docket-Entries:

13. October 28, 1975 Answer of Lancaster County Tax Claim Bureau filed. (5 pages with Exhibits A,B,C & D)

14. October 31, 1975 Preliminary Objections filed by Borough of Millersville (1 page)

15. November 3, 1975 Affidavit of service of the Complaint filed. (2 pages)

16. November 5, 1975 Acceptance of service of Preliminary Objections filed on behalf of Lancaster County Tax Claim Bureau and County of Lancaster. (1 page)

17. November 5, 1975 Acceptance of service of Preliminary Objections filed on behalf of Della Becker. (1 page)

18. November 5, 1975 Acceptance of service of Preliminary Objections filed on behalf of First Pennsylvania Bank N.A. (1 page)

19. November 5, 1975 Acceptance of service of the answer of Lancaster County Tax Claim Bureau filed on behalf of First Pennsylvania Bank N.A. (1 page)

20. November 6, 1975 Acceptance of service of the Preliminary Objections on behalf of School District of Lancaster filed. (1 page)

21. November 6, 1975 Answer of Della Becker filed. (4 pages)

December 1, 1975 On Argument List - The Preliminary Objections by School District of Lancaster, County of Lancaster and Borough of Millersville are sustained.

22. January 2, 1976 Notice of Deposition filed. (1 page)

23. January 26, 1976 Defendant Della Becker's Written Interrogatories to Plaintiff and William C. Enselen, its Vice President filed. (4 pages)

24. January 28, 1976 Testimony of Haywood Eric Becker filed. (36 pages)

25. February 5, 1976 Plaintiff's Objections to defendant Della Becker's Interrogatories filed. (2 pages)

26. February 19, 1976 Petition for Consolidation of Trials presented to the Court and the Court enters Order allowing Equity No. 16, Page 194 and Equity 16, Page 242 be consolidated for trial. (6 pages)

27. February 25, 1976 Defendant Della Becker's answer to Petition for Consolidated Trials filed. (3 pages)

28. March 15, 1976 Plaintiff's Interrogatories to defendant Lancaster County Tax Claim Bureau filed. (9 pages)

29. March 16, 1976 Affidavit of service of the Petition and Order for Consolidated Trials filed. (4 pages)

March 23, 1976 Petition to Produce and Permit Inspection presented to the Court and the Court grants a rule returnable April 5, 1976 (4 pages)

[illegible] Plaintiff's Interro-
[illegible]

State of Pennsylvania, } ss.:
County of Lancaster, }

Among the Records *record in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, to*
Equity No. 16, Page 242
Term, ____ No. ____ is contained the following:

Docket Entries:

April 5, 1976 On Argument List - Argued C.A.V.

12. April 5, 1976 Answer to Petition to Produce and Permit Inspection filed. (2 pages)

13. April 6, 1976 Answers of Plaintiff to Defendant Della Becker's Interrogatories filed. (2 pages)

14. April 7, 1976 Acceptance of service of the answer to Petition to Produce and Permit Inspection filed on behalf of Lancaster County Tax Claim Bureau. (1 page)

15. April 8, 1976 Acceptance of service of the answer to Petition to Produce and Permit Inspection filed on behalf of Della Becker. (1 page)

16. April 9, 1976 Motion to strike Della Becker's Objections to Plaintiff's Interrogatories filed. (2 pages)

17. April 15, 1976 Opinion filed. (3 pages)

AND NOW, April 15, 1976, for the foregoing reasons plaintiff's objections to Becker's interrogatories are overruled and dismissed and plaintiff is directed to answer all interrogatories and supply the papers and documents requested (or permit Becker or her attorney or agent to copy same), this order to be complied with within thirty days hereof.

By the Court:

Wilson Bucher, Judge

38. June 2, 1976 Supplementary answers of First Pennsylvania Bank to Defendant Della Becker's Interrogatories filed. (4 pages)

39. June 2, 1976 Notice of Deposition filed. (1 page)

June 7,1976 On Argument List - continued

40. June 11, 1976 Answer of Lancaster County Tax Claim Bureau to Plaintiff's Interrogatories filed. (4 pages with Exhibits A,B, C. & D.)

41. June 17, 1976 Acceptance of service of answer of Lancaster County Tax Claim Bureau filed on behalf of Della Becker. (1 page)

42. June 17, 1976 Acceptance of service of answer of Lancaster County Tax Claim Bureau filed on behalf of the plaintiff. (1 page)

June 21, 1976 On Equity List - continued

43. August 3, 1976 Notice of Depositions filed. (1 page)

44. August 27, 1976 Plaintiff's Response to Defendant Della Becker's Request for Production of Documents filed. (1 page)

45. September 2, 1976 Acceptance of service of Plaintiff's response to request for production of documents filed on behalf of the Lancaster County Tax Claim Bureau filed. (1 page)

46. September 22, 1976 Affidavit of service of the plaintiff's response to defendant Della Becker's Request for Production of Documents filed. (1 page)

State of Pennsylvania, } ss.:
County of Lancaster, }

Among the Records *entered in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, in* Equity No. 16, Page 242
Term, _____ *to contained the following:*

Docket-Entries:

48. October 20, 1976 Second Notice of Deposition filed. (1 page)
49. November 1, 1976 Acceptance of Service of Plaintiff's response to defendant Della Becker's request filed. (1 page)
50. November 1, 1976 Defendant, Della Becker's Reply to Plaintiff's Response filed. (1 page)
51. January 17, 1977 Notice of Depositions filed. (1 page)
February 22, 1977 On Equity List - continued
52. March 10,1977 Notice of Deposition filed. (1 page)
April 18, 1977 On Equity List
April 25, 1977 Hearing held before Judge Wilson Bucher - testimony to be transcribed and placed on the Argument List.
53. August 16, 1977 Testimony Lodged. (239 pages with Exhibits)
53). September 1, 1977 Testimony filed. (239 pages with Exhibits)
54. September 13, 1977 Stipulation of Counsel and Order Staying Tax Sale filed. (2 pages)
55. September 29, 1977 Plaintiff's Trial Brief filed. (38 pages)
56. October 17, 1977 Defendants Della Becker's Trial Brief filed. (31 pages)
57. October 17, 1977 Affidavit of service of Defendant Della Becker's Brief filed. (1 page)
58. October 19, 1977 Lancaster County Tax Claim Brief filed. (2 pages)
59. November 9, 1977 Stipulation filed. (2 pages with Exhibit-12 pages)
60. November 10, 1977 Decree Nisi filed. (10 pages)
AND NOW, November 10, 1977, plaintiff's complaint is dismissed.
If no exceptions are filed within ten days after notice of filing of this adjudication a final decree shall be entered by the Prothonotary on praecipe.
By the Chancellor:
Wilson Bucher
61. November 18, 1977 Plaintiff's Exceptions to Adjudication filed. (2 pages)
62. November 18, 1977 Certificate of service of Plaintiff's Exceptions to Adjudication filed. (1 page)
63. November 22, 1977 Della Becker's Exceptions to Statement of Facts filed (5 pages)
64. January 16, 1978 Plaintiff's Brief filed. (39 pages)
65. January 16, 1978 Affidavit of service of the plaintiff brief filed
66. January 24, 1978 Defendant Della Becker's Brief filed. (32 pages)
[illegible] 1978 Lancaster County Tax Claim Bureau's Brief filed
[illegible] Opinion filed

State of Pennsylvania, County of Lancaster, } ss.:

Among the Records *retained in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, in* Equity No. 16, Page 242 *Term,* ——— *No.* ——— *is contained the following:*

Docket Entries:

69. March 20, 1978 Notice of Appeal to Superior Court with proof of service filed. (2 pages)

70. April 4, 1978 Amended Notice of Appeal to Commonwealth Court with proof of service filed. (2 pages)

May 30, 1978 Record sent to the Commonwealth Court.

August 15, 1979 Opinion filed by Commonwealth Court affirming Decree Nisi and Final decree—record to follow.

August 9, 1982 Notice of Appeal to the Supreme Court of the United States filed.

State of Pennsylvania, County of Lancaster, } ss:

I, Ethel M. Zook, Prothonotary of the Court of Common Pleas of Lancaster County, do certify that the within is a true and correct copy of the Docket Entries in Equity No. 16, Page 242 as the same remains filed and of record in said Court.

WITNESS my hand and seal of said Court at Lancaster, this 31st day of August, 19 82

Ethel M. Zook

Prothonotary

Deputy Prothonotary

Fees:

IN THE SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

FIRST PENNSYLVANIA BANK N.A.	:	JANUARY TERM, 1979
Appellant	:	
	:	
v.	:	
	:	
LANCASTER COUNTY TAX CLAIM BUREAU	:	
	:	
&	:	
	:	
DELLA BECKER	:	
Appellees	:	NO. 461

PETITION AND MOTION TO QUASH APPEAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Della Becker files this Petition to quash the appeal from the Order of the Commonwealth Court, filed by First Pennsylvania Bank N.A., for the following reasons:

1. The interest of appellant, First Pennsylvania Bank N.A., in the land formerly owned by Bernard DiSabatino was represented by a loan by appellant to DiSabatino on a loan agreement, under which appellant loaned to DiSabatino Construction Corporation, the sum of $1,100,000., appellant receiving as collateral security for said loan first mortgages, each in the sum of $1,100,000. on five separate parcels of ground, the parcel of ground subject of this suit being one of the said five parcels. The other four parcels of ground covered by the individual $1,100,000. mortgages are in Berks County, Pa., Lehigh County, Pa., New Castle, Delaware and Delaware County, Pa.

2. At the time of the trial of this case, held on April 25, 1977, the appellant had commenced foreclosure proceedings on each of the other four mortgages securing the $1,100,000. debt.

3. Some time after the trial of this matter, the mortgage foreclosures instituted by the appellant were finally completed by Sheriff sales under the foreclosure proceedings. Attached hereto are certified copies of the foreclosure proceedings instituted by appellant in Delaware County, Pa., marked Exhibit A; in Berks County, Pa., marked Exhibit B; and in Lehigh County, Pa., marked Exhibit C; said copy certified to by the Prothonotary of each court showing the amount of the judgment entered against Bernard A. DiSabatino and Joan K. DiSabatino, based on the $1,100,000. mortgage given by the DiSabatinos as collateral security for the $1,100,000. construction loan.

5. The docket entries disclose that in each foreclosure proceeding the First Pennsylvania Bank N.A. failed to file a petition to fix the fair market value of the real property sold within six months of the execution and delivery of the Sheriff's deed to the appellee, who became the purchaser at said foreclosure proceedings.

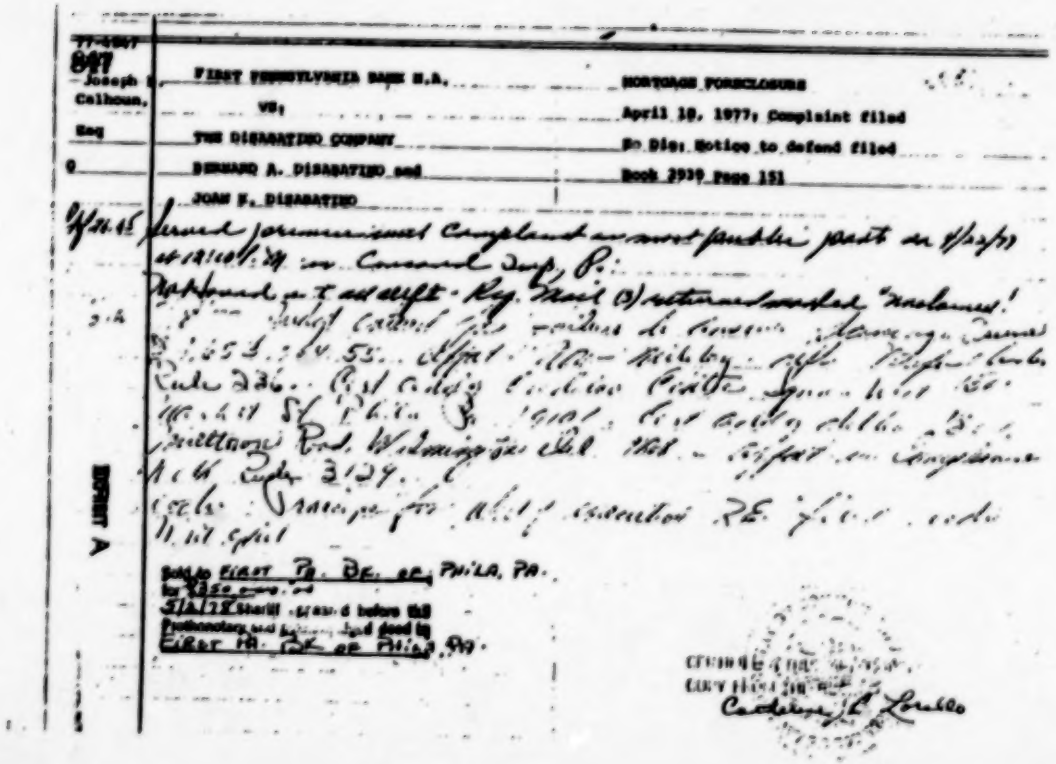
6. By reason of the failure of the appellant to follow the requirements of the Deficiency Judgment Act of July 16, 1941, P.L. 400, Sec. 1, *et seq.* (12 P.S. 2621.1 *et seq.*), as amended by the Judiciary and Judicial Procedure Act of July 9, 1976, P.L. 586, Sec. 1, *et seq.*, the debt of the obligors and sureties on the $1,100,000. has been satisfied and the sureties released from any liability thereon, by reason of the conclusive presumption that the property foreclosed was worth at least the full amount of the judgment.

7. The debt due to appellant having been conclusively presumed to have been paid by reason of said foreclosures, appellant has no further interest or claim under the mortgage held by it in Lancaster County and

therefore the claim of appellant that its rights have been prejudiced by the lower court's opinion is moot, it having received full payment of the debt due to it.

WHEREFORE, your petitioner respectfully prays that your Honorable Court quash the appeal filed by appellant herein.

/s/ Maurice M. Green
Attorney for Della Becker



77-3867
847
Joseph Calhoun, Esq
Q
DOCKET A

FIRST PENNSYLVANIA BANK N.A.
vs.
THE DISABATINO COMPANY
BERNARD A. DISABATINO and
JOHN F. DISABATINO

MORTGAGE FORECLOSURE
April 18, 1977; Complaint filed
No Dig; Notice to defend filed
Book 2939 Page 151

4/18/77 Issued joinder writ and Complaint in mort pub. post on 4/22/77 at 12:10 P.M. by Constable Dept. P.
Returned & Served upon Bernard A. Disabatino by handing to him personally a true and attested copy of the within writ and Complaint and at the same time directing his attention to the contents thereof. Also served upon John F. Disabatino by handing to Bernard A. Disabatino, his agent for service, a true and attested copy of the within writ and Complaint and at the same time directing his attention to the contents thereof. Also served upon The Disabatino Company by handing to Bernard A. Disabatino, its agent for service, a true and attested copy of the within writ and Complaint and at the same time directing his attention to the contents thereof. Also served upon First Pennsylvania Bank N.A. by handing to Bernard A. Disabatino, its agent for service, a true and attested copy of the within writ and Complaint and at the same time directing his attention to the contents thereof. Also

1426

MAY TERM 1977

October Term

No. 36

FIRST PENNSYLVANIA BANK N.A.

vs

BERNARD A. DIBARTINO and JOAN E. DIBARTINO

$ 15.50	Complaint reinstated. Served the [illegible] CERTIFIED IN PURSUANCE FOR SERVICE upon the within named defendants as follows: April 13, 1977, Sheriff certified copies thereof to BERN E. DIBARTINO and to BERNARD A. DIBARTINO, by registered mail, return receipt requested, to each of their last known post office address, Post Office, Bond, [illegible]
3.00	
6.00	
10.00	

I posted a certified copy thereof to the most conspicuous part of the premises described herein, to wit: PARCEL OF LAND situate a short [illegible] Township of Haverford, County of Berks, Pa. July 22, 1977 Sheriff's return filed. August 31, 1977, @ 11:00 A.M., Default Judgment entered in favor of the Plaintiff and against the Defendants, Bernard A. and Joan E. DiBartino, for failure to file an Answer to the Plaintiff's Complaint within twenty (20) days from the date of service thereof, and assess damages in the amount of $1,671,662.20, as per praecipe, filed. Entered to No. 36 May Term 1977 T.D. Sheriff Affidavit as to non-military service, filed. Sheriff Notice of entry of Judgment by Prothonotary, issued.

WRIT OF EXECUTION (MORTGAGE FORECLOSURE) Entered As No. 3 November Term 1977 E.D.

April 7, 1977, Complaint in Action of Mortgage Foreclosure, ALL THAT CERTAIN piece, parcel or tract of land situate a short distance northeastwardly from College Boulevard, in the Township of Haverford, County of Berks and State of Pennsylvania (for full description see Complaint) recorded, Mortgage of Deeds in Mortgage Book No. 1551, Page 353, with notice to defend, filed. Sheriff Certificate to Recorder of Deeds, issued. Sheriff Copy certified by Attorney, issued to Sheriff. [illegible] July 13, 1977, Praecipe to reinstate Complaint, filed. Sheriff

Extract from the record of said Court.

Certified this 7th day of June 1978

JOHN R. ADAMS, Prothonotary

[signature] Deputy

100	First Pennsylvania Bank N.A. VS Bernard A. DiSabatino Joan K. DiSabatino	No. 36 May T 1977 A.D. Aug. 11, 1977, Judgment entered in favor of the plaintiff and against the defendants for the sum of $1,671.662.30, the defendants having failed to file an Answer to Plaintiff's Complaint within 20 days from the date of service thereof.

Extract from the record of said Coun
Certified this 29th day of Jan
JOHN R. ARNDT Prothonotary
Linda Shultz Deput

A13

Appellee's Petition and Motion to Quash Appeal

Eugene C. LaManna

1

FIRST PENNSYLVANIA BANK, N.A.

vs

BERNARD A. DiSABATINO and JOAN E. DiSABATINO, his wife

No. 100 August Term 1977 J.D.
No. 36 May Term 1977 A.D.

Affidavit of Non-Military, filed.
Certificate of Residence, filed.

October 11, 1977, Writ of Execution
MORTGAGE FORECLOSURE
Real Debt: $1,671,662.30
Interest From: March 22, 1977

COSTS		
Prothonotary	Paid	31.50
Judgment		3.00
Satisfaction (Boland)	Paid	3.00
Sheriff Kramer	Paid	24.93
Reading Eagle		138.[illegible]
Law Tel.		132.25
Sexton		162.[illegible]
Proth-		3.00
Auctioneer		4.60
Recorder		2.[illegible]
Pa. Realty Tax		576.00
Maxatawny Twp. Realty Tax		576.00
Sheriff Kramer		[illegible]
Poundage		133.0[illegible]
Total Paid:		$2,925.32

TO THE HONORABLE THE JUDGES OF THE COURT OF COMMON PLEAS OF BERKS COUNTY: In obedience to and by virtue of the within Writ, after due, fair and legal notice having been given of the time and place of sale, I did on the 9th. day of December, 1977, expose the premises within described with the appurtenances, to sale by public vendue or outcry, and sold the same

TO EUGENE C. LAMANNA, ESQ., Atty. for Plaintiff

For the sum of	$10.00
To balance costs	2,034.34
Total Paid	$2,044.34

PLEASE NOTE: The within Real Estate has been assigned to CARL A. LOBB, as per assignment set forth on Conditions of Sale. SO ANSWERS, John E. Kramer, Sheriff of Berks County, Pa. April 10, 1978

Sheriff's return Certificate filed. Sheriff's Deed to Carl A Lobb, 217 South Whitetail St. Kutztown, PA 19530 recorded in Deed Book 1733 Page 192

Extract from the record of said Court
Certified this 22 day of Dec. 1978
JOHN R. APPEL, Prothonotary
Deputy

708 April 1977

J.C.Lansha			First Pennsylvania Bank N.A. Centre Sq.East., 1500 Sansom St.,Phila.P		
	708		v		Mortgage Foreclosure
			Bernard A. DiSabatino and Joan E. DiSabatino(1141 W.Ellis St.,Allentown,P		
		3 00			
P-pd		12 50	Mar 31 1977	Complaint	
				Notice to defend	
				Copy cert and exit Rul Returnable 20 days	
			May 10	Affidavit of J.C.Lansha, Jr. as to adress of dfts.	
			May 11	Shff's rtn complaint [illegible]	
			May 24	Shff's rtn complaint [illegible]	
pd		6 00	Jul 21	Prae for jdgt vs. dfts. for failure to answer	
				Jdgt entered vs. dfts. in amount of $1,133,250.26	
pd		10 00	Jul 21	Prae for execution Writ no.26 Sep. 77	
				Writ exit	
			Jul 22	Affidavit of Notice	
			Jul 21	Affidavit under Soldiers' and Sailors' Civil Relief Act	
Shff's cost		28[illegible]	Oct 26	Shff's rtn Writ "Now [illegible] Dwel Lot Atty.James C. Lansha, Jr. Sale for First Penna. Bank N.A. for the sum of $1.00 Shff's costs $2,[illegible].0	
				Condition of Sale	
				Shff's Deed Acknowledged.	

EXHIBIT C

CERTIFIED FROM THE RECORD
THIS 14th DAY OF Feb A.D. 19 77

JOSEPH A. JOSEPH, CLERK OF COURTS

BY Nita Ehrhard

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIRST PENNSYLVANIA BANK N.A.

v.

COUNTIES INVESTMENT CORP.

MEMORANDUM AND ORDER
(Filed January 4, 1978)

Newcomer, J. January 4, 1977 (sic)

Plaintiff has moved for summary judgment against all parties and defendant Counties Investment Corp. (Counties) has filed a cross-motion for summary judgment in its favor. For reasons set forth below, plaintiff's motion will be denied and judgment will be entered in favor of Counties on its motion.

Plaintiff, First Pennsylvania Bank, was the mortgagee of real property which was sold for delinquent school taxes in 1975. The tax liens were incurred in 1973, 1974 and 1975, while the mortgage was issued in 1974.[1] Therefore, the 1975 tax sale resulted in discharge of the mortgage because of the 1973 lien's seniority. 72 P.S. Sec. 5860.609. Under this provision however, school tax liens which accrued after the recordation of the mortgage in January 1974 were not senior. Plaintiff contends that the Real Estate Tax Sale Law, 72 P.S. Sec. 5860.609. Under this provision how-

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[1] The facts underlying these motions have been stipulated to by counsel. Pursuant to this stipulation, all counts but count 1 have been withdrawn.

ever, school tax liens which accrued after the recordation of the mortgage in January 1974 were not senior. Plaintiff contends that the Real Estate Tax Sale Law, 72 P.S. Sec. 5860.609 *et seq.*, is unconstitutional on due process grounds because it does not require notice to be mailed to the mortgagee, but only to the owner of record. The statute provides for notice by publication to lien creditors. 72 P.S. Sec. 5860.602. Furthermore, it requires all liens to be recorded. 72 P.S. Sec. 5860.307. The statute also gives the right of redemption to any lien creditor. 72 P.S. Sec. 5860.501. This section provides that if the delinquent taxes are paid by a creditor within one year after the taxes became liens, that lien creditor's judgment will become senior to all other liens, "stepping into the shoes" of the tax lien.

Defendant contends, and the Court agrees, that these procedures give mortgagees the process they are due. This Court recognizes that mortgagees have a significant property interest in a mortgage. However, the Pennsylvania statutory system provides a number of ways to protect this interest. First, before granting a mortgage, the prospective mortgagee can search the title. Such a search should reveal any unpaid taxes which have become liens. If the mortgagee still desires to enter into the transaction, in spite of these liens, it can require that the taxes be paid as a condition precedent to the mortgage. A more sure method of protecting the mortgage from discharge is to exercise its rights as a creditor to pay the delinquent taxes under the redemption provision. Although these options were available to the plaintiff, it apparently chose not to exercise them. The recordation of tax liens provides notice to the mortgagee that the mortgage lien will be junior and that a tax sale might discharge it. Failure to properly search title or to heed this warning does not in any way eliminate this notice; it exists whether or not the mortgagee wishes to avail itself of it. Coupled with this notice, however, is a further published notice at the time of sale. These two statutory mechanisms for notice fully apprise the mortgagee so that it may protect its financial property.

Plaintiff cites only two cases which require mailed notice to the mortgagee.[2] They both hold that a mortgagee is entitled to mailed notice when a municipality intends to demolish mortgaged property which has become a nuisance. That factual pattern differs greatly from the case at bar. In the situation of condemnation, the mortgagee has no prior notice, through recordation or otherwise, of the possibility of state action. Here, the noting of the lien on the docket is a public announcement that a tax sale may occur. Second, even if the mortgagee were notified of the possibility of condemnation, it could take no statutory steps to avoid it. Under the Tax Sale law, the mortgagee may prevent state action by exercising its right of redemption. In light of these important differences, this Court believes that the mailed notice required in those cases is not mandated here.

The seminal due process case on notice is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). There, the Supreme Court held that all that the due process clause required was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Here, where the statutory scheme not only provides notice of the tax delinquency, but also provides a mechanism for completely avoiding state action, this Court holds that due process is served. To hold otherwise, and to require mailed notice to mortgagees prior to a sale, would place an intractable burden on the taxing authorities. For each property, the record would have to be fully searched. The Court believes that such a title search, which is a normal concommittant of a

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[2] Pioneer Savings and Loan v. City of Cleveland, No. C69-922 (N.D. Ohio Sept. 21, 1970) (Lambros, J.); Pioneer Savings and Loan v. City of Cleveland, No. C69-922 (N.D. Ohio March 28, 1972) (Green, J.).

mortgage transaction, is more properly done by the mortgagee, which can include its administrative costs in the mortgage agreement. There does not seem to be any reason, in light of the statutory protections built into the Tax Sale Law, to shift this burden. Therefore, the plaintiff's attack on the Tax Sale Act as constitutionally deficient must fail. Defendant Counties' motion will be granted, and plaintiff's motion will be denied.

/s/ Clarence C. Newcomer
CLARENCE C. NEWCOMER
J.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

August 27, 1982

Heywood Eric Becker, Esq.
The Old York Road
New Hope, Pennsylvania 18938

Re: First Pennsylvania Bank, N.A. v.
Lancaster County Tax Claim Bureau
and Della Becker, No. 82-268

Dear Mr. Becker:

Your request of August 24, 1982, for an extension of time within which to file a motion to dismiss in the above-entitled case is granted, and the time has been extended to and including October 7, 1982.

Very truly yours,

/s/
Alexander L. Stevas
Clerk

cc: Richard M. Shusterman, Esq.
White and Williams
1234 Market Street, 16th Floor
Philadelphia, Pennsylvania 19107

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HEYWOOD ERIC BECKER, ESQ.
The Old York Road, New Hope, Pennsylvania 18938 Phone 215 862 2131

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Supreme Court, U.S.

No. 82-268
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee,

and

DELLA BECKER,
Appellee,

MOTION OF APPELLEE, DELLA BECKER, REQUESTING CONSIDERATION OF APPELLANT'S JURISDICTIONAL STATEMENT FORTHWITH

No. 82-268
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
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and

DELLA BECKER,
Appellee,

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SUPREME COURT, U.S.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION OF APPELLEE, DELLA BECKER, REQUESTING CONSIDERATION OF APPELLANT'S JURISDICTIONAL STATEMENT FORTHWITH

Della Becker, Appellee herein, respectfully requests that this Court consider and decide Appellant's Jurisdictional Statement forthwith, for the following reasons:

1. Appellee has argued that the decree of the Supreme Court of Pennsylvania might well have rested upon the Pennsylvania Deficiency Judgement Act, an adequate and independent state ground.
2. Appellee has argued that this Court is consequently without jurisdiction.
3. Appellee has also argued that Appellant's claim is moot, for its mortgage was satisfied by operation of law.
4. Eight years have passed in litigation over the title to Appellee's real estate, the taxes continue to mount, yet the land is useless and, in fact, a burden to her, so long as her title is clouded by this suit.
5. This Court can decide Appellant's Jurisdictional Statement regardless of the outcome of Mennonite Board of Missions, Inc. v. Adams, probable jurisdiction noted, No. 82-11 (U.S. Sup. Ct., October 12, 1982).

Respectfully submitted,

Heywood Eric Becker, Esq.
Attorney for Appellee,
Della Becker

COPY

AFFIDAVIT OF SERVICE

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Commonwealth of Pennsylvania ss.

County of Bucks

I, Heywood Eric Becker, Esq., depose and say that I am an attorney for Della Becker, appellee, and that on November 8, 1982, pursuant to Supreme Court Rule 33, I served one copy of the foregoing Answer and one copy of the foregoing Motion on the parties required to be served herein, as follows:

On First Pennsylvania Bank, appellant herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Richard M. Schusterman, counsel of record for said appellant, at his office at White and Williams, 1234 Market Street, 17th Floor, Philadelphia, PA 19107.

All parties required to be served have been served.

Heywood Eric Becker, Esq.

Subscribed and sworn to before me on November 8, 1982.

Angeline F. Cleary

A Notary Public of Pennsylvania

ANGELINE F. CLEARY, NOTARY PUBLIC
NEW HOPE BORO, BUCKS COUNTY
MY COMMISSION EXPIRES FEB. 22, 1986
Member, Pennsylvania Association of Notaries

HEYWOOD ERIC BECKER, ESQ.
The Old York Road, New Hope, Pennsylvania 18938 Phone 215 862 2131

No. 82-268
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RECEIVED
NOV 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee,

and

DELLA BECKER,
Appellee,

ANSWER OF APPELLEE, DELLA BECKER, TO MOTION OF APPELLANT, FIRST PENNSYLVANIA BANK, N.A., TO DEFER CONSIDERATION OF ITS JURISDICTIONAL STATEMENT

No. 82-268
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee,

and

DELLA BECKER,
Appellee,

RECEIVED
NOV 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania

ANSWER OF APPELLEE, DELLA BECKER, TO MOTION OF APPELLANT, FIRST PENNSYLVANIA BANK, N.A., TO DEFER CONSIDERATION OF ITS JURISDICTIONAL STATEMENT

Della Becker, Appellee in No. 82-268, requests that this Court not defer consideration of Appellant's Jurisdictional Statement for the following reasons:

1. Denied. Indiana tax sales divest all mortgages, whatever their priority. Ind. Code § 6-1.1-25-4.(d). Here in Pennsylvania, tax sales divest only those mortgages junior in priority to the tax lien, recorded after the real estate taxes became a lien. 72 Pa. Cons. Stat. Ann. § 5860.609. These two very different effects result from the two very different state statutes. The issues here and in Mennonite Board of Missions, Inc. v. Adams are not identical.
2. Admitted in part, denied in part. If First Pennsylvania Bank had taken care to see that the taxes were paid before recording its mortgage, the subsequent tax sale would not have affected its lien. Only junior mortgages, subject to the tax lien, are divested. The general question of what notice is due junior lienholders when their security is to be sold has been decided by this Court. Even a Federal lien was properly divested by a prior senior lien at a Pennsylvania Sherriff's sale without any notice to the United States. USA v. Brosnan, 363 U.S. 237 (1960). Moreover, First Pennsylvania Bank had actual record notice, when recording their mortgage, of the prior senior tax lien.

3. Admitted. Owners must receive personal notice.

4. Admitted.

5. Denied. Appellee has argued that the Supreme Court of Pennsylvania may not have decided this case on a Federal ground, but rather on Pennsylvania's Deficiency Judgement Act, an independent and adequate state ground. There is no reason to defer action on its Jurisdictional Statement, for the appeal should be dismissed. If probable jurisdiction should be noted, then briefing can be deferred until Mennonite Board of Missions, Inc. v. Adams has been decided.

Respectfully submitted,

Heywood Eric Becker, Esq.
Attorney for Appellee,
Dell. Becker

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-268

IN THE

Supreme Court of the United States

October Term, 1982

FIRST PENNSYLVANIA BANK, N.A.,
Appellant
v.
LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee
and
DELLA BECKER,
Appellee

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

REPLY BRIEF OF APPELLANT FIRST PENNSYLVANIA BANK, N.A. TO APPELLEE DELLA BECKER'S MOTION TO DISMISS

RICHARD M. SHUSTERMAN
(Counsel of Record)
RANDY A. MASLOW
Attorneys for Appellant

Of Counsel:
WHITE AND WILLIAMS
1234 Market Street, 17th Floor
Philadelphia, PA 19107
(215) 854-7000

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ARGUMENT

1. Reply to Appellee's First Argument

Appellee Della Becker alleges in her Motion to Dismiss that "appellant failed to give notice to the Pennsylvania Attorney General as required by Pa. R. C. P. 235." Appellee Della Becker's Motion to Dismiss at 7 (hereinafter, "Motion to Dismiss"). Appellee further alleges that appellant First Pennsylvania Bank, N.A. ("First Pennsylvania") has failed to comply with Rule 28.4(c) of this Court, and that appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law "was deemed abandoned for failure to comply with Pa. R. C. P. 235." Motion to Dismiss at 8. Each and every one of these allegations is simply incorrect. Appellant has complied with Pa. R. C. P. 235 at each and every stage of the litigation in the state courts below, having notified the Attorney General of Pennsylvania by registered mail that a question had been raised as to the constitutionality of the Pennsylvania Real Estate Tax Sale Law in First Pennsylvania's Complaint filed in the Court of Common Pleas of Lancaster County, in First Pennsylvania's Complaint filed in the United States District Court for the Eastern District of Pennsylvania on June 27, 1975, and in First Pennsylvania's Appeal to the Commonwealth Court of Pennsylvania. Copies of the notices from appellant to the Attorney General of Pennsylvania in each of the above instances, together with copies of the Pennsylvania Attorney General Office's acknowledgments of receipt of such notices, are set forth in the Supplemental Appendix hereto at A1-A7. In addition, appellant has complied with Rule 28.4(c) of this Court, having served a copy of its Jurisdictional Statement upon the Attorney General of Pennsylvania on

August 16, 1982. A copy of the Receipt for Certified Mail, acknowledging receipt by the Pennsylvania Attorney General's Office, is set forth in the Supplemental Appendix hereto at A9-A10. Furthermore, appellee's assertion that "appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was deemed abandoned for failure to comply with Pa. R. C. P. 235" (Motion to Dismiss at 8) is totally without merit. Not only has appellant clearly complied with Pa. R. C. P. 235 at each stage of the proceedings in the state courts below, but even if appellant had not so complied, it is simply untrue that any state court below "deemed" appellant's constitutional challenge "abandoned". This alleged "issue" of compliance with Pa. R. C. P. 235 was not (and in fact could not have been) raised at any stage of the proceedings in the state courts below. Appellant has fully complied with all requirements of Pa. R. C. P. 235 and Rule 28.4(c) of this Court. Appellant's federal question was properly raised at each stage of the litigation in the courts of the Commonwealth of Pennsylvania. See opinions and orders fully set forth in the Appendix to First Pennsylvania's Jurisdictional Statement.

2. Reply to Appellee's Second Argument

Appellant filed a complaint in the United States District Court for the Eastern District of Pennsylvania in June, 1975, No. 75-1858. On November 21, 1975, by Order of the Honorable E. Mac Troutman, the court stayed the proceedings pending disposition of First Pennsylvania's related action (the instant case) in the courts of the Commonwealth of Pennsylvania. Judge Troutman further ordered that the Clerk of Court mark the federal action closed for statistical purposes and that the matter be placed in the civil suspense file. Copies of the district court's

Order and the docket entries in the federal action are provided in the Supplemental Appendix hereto at A11-A16.

3. Reply to Appellee's Third Argument

In reply to the third argument raised in appellee's Motion to Dismiss to the effect that the federal question is not substantial, appellant First Pennsylvania Bank, N.A., hereby incorporates its previously filed Jurisdictional Statement as if fully set forth herein, which Jurisdictional Statement clearly shows that the federal question raised therein is substantial. Appellant further notes that this Court noted probable jurisdiction in the appeal of *Mennonite Board of Missions, Inc. v. Adams*, 427 N. E. 2d 686 (Ind. Ct. App. 1981), *prob. juris. noted*, No. 82-11 (U. S. Sup. Ct., October 12, 1982). The *Mennonite* case raises virtually identical issues as to the constitutionality of Indiana's pre-tax sale notice provisions under the Indiana Tax Sale Statutes, Ind. Code §§ 6-1.1-24-1 to 6-1.1-25-19 (1976). The Indiana statute, like the Pennsylvania statute, provides that, with respect to a mortgagee the name and address of which is a matter of public record, notice of an impending tax sale need only be posted and published. Ind. Code § 6-1.1-24-3 (1976); 72 Pa. Cons. Stat. Ann. § 5860.602 (Purdon 1968). As in the instant appeal, the Appellants in *Mennonite Board of Missions, Inc. v. Adams* have challenged state pre-tax sale notice statute provisions as insufficient to meet constitutional due process standards. The federal question raised in the instant appeal is clearly substantial.

4. Reply to Appellee's Fourth Argument

Appellee alleges in Part 4 of her Motion to Dismiss that the Pennsylvania Deficiency Judgment Act operates

to discharge appellant's mortgage, and that the alleged operation of the Deficiency Judgment Act provides an independent and adequate state grounds for the judgment of the Pennsylvania Supreme Court. This alleged issue was never decided in the course of the proceedings below in the Common Pleas and Commonwealth Courts of Pennsylvania, respectively. The opinion of the Chancellor in the state trial court noted that:

> "The only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales." Appendix to Appellant's Jurisdictional Statement at A12.

The Chancellor expressly held that the Pennsylvania Real Estate Tax Sale Law is constitutional and does not offend the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at A14.

Judge Richard Disalle's opinion for the Commonwealth Court, which affirmed on the basis of Chancellor Bucher's Adjudication and Decree Nisi and the Opinion and Final Decree of the Common Pleas Court *en banc*, explicitly notes that "the Chancellor refused to set aside the disputed tax sale and held the Real Estate Tax Sale Law . . . to be constitutional." Appendix to Appellant's Jurisdictional Statement at A2-3.

The Pennsylvania Supreme Court's Decree indicates merely that "the appeal having been improvidently granted, the same is hereby dismissed." Appendix to Appellant's Jurisdictional Statement at A16. The Pennsylvania Supreme Court's judgment makes no reference to any alleged operation of the Deficiency Judgment Act as bearing on its decision. The only relevant issue de-

veloped in the courts below [1] was the constitutional challenge of the appellant to the pre-tax sale notice provisions of the Pennsylvania Real Estate Tax Sale Law. The Pennsylvania Supreme Court's Decree merely shows that the Pennsylvania Supreme Court declined to exercise its discretionary review of the decisions by the trial and intermediate appellate courts rejecting appellant's constitutional challenge to the pre-tax sale notice provisions of the Pennsylvania Real Estate Tax Sale Law.

This Court has heard numerous cases on the merits where the highest court of the state refused to exercise discretionary review, as happened in this case. *See e.g., Douglas v. California,* 372 U. S. 353 (1963); *Konigsberg v. State Bar,* 353 U. S. 252 (1957). Moreover, there is no requirement that the highest court of the state explicitly enter a written opinion upholding a state statute in the face of a challenge based on the Federal Constitution in order for this Court to hear the appeal. In *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63 (1928), the Court stated:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular formal words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

1. The issue of whether or not the sale should have been set aside on equitable grounds was raised by appellant and rejected by the courts below. The rejection of that argument required the state courts to reach appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law. Only if the state courts had accepted appellant's equity argument would it have been unnecessary for the state courts to reach the federal constitutional issue.

> And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*" 278 U. S. at 67 (emphasis added).

Here, appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was the very same issue raised below and the "necessary effect" of the Pennsylvania Supreme Court's order dismissing the appeal was to affirm the order of the Commonwealth Court and to deny appellant's constitutional claim. To say that the judgment of the Supreme Court of Pennsylvania was based on appellee's version of the alleged operation of the Pennsylvania Deficiency Judgment Act is mere speculation and is not supported by the record, which shows that appellant's constitutional challenge was clearly raised, considered and rejected by the trial and intermediate appellate court below. The mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law, does not create an adequate and independent state ground to support the decision of the state courts in rejecting appellant's constitutional challenge. *See e.g., United Airlines, Inc. v. Mahin*, 410 U. S. 623, 630 (1973), *citing Beecher v. Alabama*, 389 U. S. 35, 37 n. 3 (1967). *See also Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98 (1938). This Court is presented with a substantial federal question which was clearly presented and rejected by the state courts below.

There are no independent and adequate state grounds to support the judgment of the Pennsylvania Supreme Court. Appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was clearly raised and considered below by the courts of the Commonwealth of Pennsylvania. The decision of the Supreme Court of Pennsylvania, refusing to exercise its discretionary power to review the Pennsylvania Commonwealth Court's rejection of appellant's federal constitutional challenge to the Pennsylvania Real Estate Tax Sale Law, provides no independent and adequate state grounds to support the decision below.

Respectfully submitted,

RICHARD M. SHUSTERMAN
(Counsel of Record)
RANDY A. MASLOW
Attorneys for Appellant

Of Counsel:

WHITE AND WILLIAMS
1234 Market Street
Philadelphia, PA 19107

9/2-7764 October 20, 1975

Hubert B. Barnes,
Deputy Attorney General
Pennsylvania Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank v. Lancaster
County Tax Claim Bureau, et al.

Dear Mr. Barnes:

Enclosed is a copy of a Complaint filed in the Court of Common Pleas of Lancaster County on behalf of our client, First Pennsylvania Bank N.A. You will note that it is alleged that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. section 5860.101 et. seq. and particularly section 602 thereof, 72 P.S. 5860.602 is unconstitutional as applied to the plaintiff, a mortgagee of real property, in that it authorizes the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 235(a) of the Pennsylvania Rules of Civil Procedure.

Respectfully yours,

Miles H. Shore

MHS:cp
Enclosures

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

bcc: Mr. William C. Ensslen, Jr.,
Vice President
Alan E. Casnoff, Esquire

Law Offices of
SAUL, EWING, REMICK & SAUL
38th Floor Centre Square West
Philadelphia 19102

Cable Address: BIDSAL
Telephone (215) 972-7777
Telecopier (215) 972-7725
Telex 83-4798
Direct Dial (215) 972-7764

Associated Offices
Harrisburg, Pa.
Washington, D. C.
London, England
Frankfurt/Main, Germany

August 2, 1978

Attorney General
Commonwealth of Pennsylvania
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank N.A. v.
Lancaster County Tax Claim Bureau
and Della Becker—Commonwealth
Court—No. 944 C.D.—1978

Dear Sir:

This is to advise you that an appeal has been filed by First Pennsylvania Bank from the Court of Common Pleas of Lancaster County to the Commonwealth Court in the above case in which appeal it is argued that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. § 5860.101 et seq. and particularly § 602 thereof, 72 P.S. 5860.602, is unconstitutional as applied to First Pennsylvania Bank, a mortgagee of real property, in that it authorizes the taking of valuable property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 521(a) of the Pennsylvania Rules of Appellate Procedure.

Prior notice of the filing of the Complaint in the lower court was given to your office by my letter dated October 20, 1975 addressed to Hubert B. Barnes, Deputy Attorney General, receipt of which was acknowledged by Jeffrey Cooper, Deputy Attorney General.

Very truly yours,

Miles H. Shore

MHS:cp

cc: Maurice M. Green, Esquire
Carl G. Herr, Esquire

972-7764 June 30, 1975

The Honorable Robert P. Kane,
Attorney General
Pennsylvania Department of Justice
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank v. Lancaster
County Tax Claim Bureau et al.

Dear General Kane:

Enclosed is a copy of a Complaint filed in the United States District Court for the Eastern District of Pennsylvania on June 27, 1975 on behalf of our client, First Pennsylvania Bank N.A. You will note that it is alleged that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. section 5860.101 et seq. and particularly section 602 thereof, 72 P.S. 5860.602 is unconstitutional as applied to the plaintiff, a mortgagee of real property, in that it authorizes the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 235(a) of the Pennsylvania Rules of Civil Procedure and the Federal Rules of Civil Procedure, if applicable.

Respectfully yours,
Miles H. Shore

cp
Enclosures

cc: Mr. William C. Ensslen, Jr.,
Vice President
Frank O'Donnell, Esquire
Alan E. Casnoff, Esquire

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120

October 22, 1975

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor
Center Square West
Philadelphia, PA 19102

Re: First Pennsylvania Bank v. Lancaster County
Tax Claim Bureau, et al.,

Dear Mr. Shore:

This is to acknowledge our receipt of your notice pursuant to Pennsylvania Rule of Civil Procedure 235. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Sincerely,

/s/ JEFFREY COOPER
Jeffrey Cooper
Deputy Attorney General

JC/pay

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120

August 18, 1978

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor Centre Square West
Philadelphia, Pennsylvania 19102

Re: First Pennsylvania Bank N.A. v.
Lancaster County Tax Claim Bureau
and Della Becker—Commonwealth
Court—No. 944 C.D.—178

Dear Mr. Shore:

This will acknowledge receipt of your letter with regard to the above captioned matter, pursuant to Rule 521(a) of the Pennsylvania Rules of Appellate Procedure. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Very truly yours,

/s/ LORIE J. PAPAGODA
Lorie J. Papagoda
Paralegal

LJP/le

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120
Capitol Annex
(717) 787-4453

July 11, 1975

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor Centre Square West
Philadelphia, PA 19102

Re: First Pennsylvania Bank v. Lancaster County
Tax Claim Bureau, et al.,

Dear Mr. Shore:

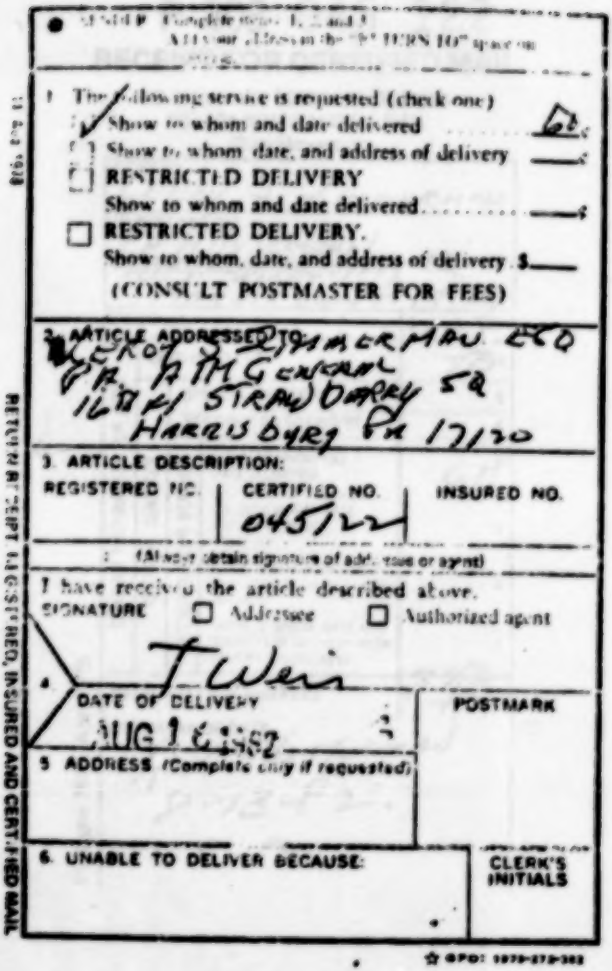
This is to acknowledge our receipt of your notice pursuant to Pennsylvania Rule of Civil Procedure 235. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Sincerely,

/s/ HUBERT B. BARNES
Hubert B. Barnes
Deputy Attorney General

HBB/slb

cc: Clerk of Court
U.S. District Court
Eastern District of Pa.



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IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-1858

FIRST PENNSYLVANIA BANK N.A.

v.

LANCASTER COUNTY TAX CLAIM BUREAU

and

MILLERSVILLE BOROUGH

and

COUNTY OF LANCASTER

and

SCHOOL DISTRICT OF LANCASTER

and

DELLA BECKER

ORDER

AND Now, this 21st day of November 1975, the court having been previously advised that the above action cannot proceed to trial and disposition because of the following reason:

Order staying these proceedings pending disposition of a related action.

it is

ORDERED that the Clerk of Court mark this action closed for statistical purposes and place the matter in the Civil Suspense File, and it is

FURTHER ORDERED that the Court shall retain jurisdiction; and that the case be restored to the trial docket when the action is in a status so that it may proceed to final disposition; this order shall not prejudice the rights of the parties to this litigation.

BY THE COURT:

/s/ E. MAC TROUTMAN, *J.*
E. Mac Troutman

Current Docket Entries in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 75-1858

FIRST PENNSYLVANIA BANK N.A.

Plaintiff

v.

LANCASTER COUNTY TAX CLAIM BUREAU

&

MILLERSVILLE BOROUGH

&

COUNTY OF LANCASTER

&

SCHOOL DISTRICT OF LANCASTER

&

DELLA BECKER

Defendants

CAUSE: Civil Rights
(Action to set aside a Tax Sale)
42 USCA § 1983
28 USCA §§ 1331 & 1343

MILES H. SHORE, ESQ.
SAUL, EWING, REMICK & SAUL
38th Floor—Centre Square West
Philadelphia, Pa. 19102

MAURICE M. GREEN, ESQ.
Suite 706
1530 Chestnut Street
Phila., Pa. 19102
FOR: DELLA BECKER

GEORGE T. BRUBAKER, ESQ.
BRUBAKER AND BRUBAKER
21 North Duke Street
Lancaster, Pa. 17602
FOR: SCHOOL DISTRICT OF LANCASTER

JOHN B. RENGIER, ESQ.
RENGIER, MUSSER & STENGEL
8th Fl. Griest Bldg., 8 N. Queen St.
Lancaster, Pa. 17603
FOR: BOROUGH OF MILLERSVILLE

CARL G. HERR, ESQ.
HERR, KIRCHNER & HERR
Griest Building, 8 North Queen St.
Lancaster, Pa. 17603
FOR: LANCASTER COUNTY TAX CLAIM
BUREAU OF THE COUNTY OF LANCASTER

1975

June 27 Complaint filed.

June 27 Summons exit.

Aug. 19 Summons returned: "on 7/15/75 served Della Becker", and "on 7/9/75 served Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster, & served School District of Lancaster", and filed.

Aug. 19 Appearance of Maurice M. Green, Esq., as counsel for deft. Della Becker.

Aug. 20 Appearance of George T. Brubaker, Esq. of Brubaker and Brubaker, on behalf of the School District of Lancaster, deft., filed.

Aug. 25 Appearance of John P. Rengier, Esq., Rengier, Musser & Stengel, for the Borough of Millersville, filed.

Aug. 25 Appearance of Carl G. Herr, Esq., Herr, Hirchner & Herr as counsel for Lancaster County Tax Claim Bureau & for the County of Lancaster, filed.

Aug. 25 Letter dd. 8/21/75 from C. G. Herr, Esq. to Clerk of Court, entering his appearance for County of Lancaster & Lancaster County Tax Claim Bureau & advising that, by agreement with Miles H. Shore, Esq. (Plff's attorney) that the time within which to file pleadings in this case was extended for an additional period of 30 days (from 7/9/75), filed.

Aug. 29 Motion of Della Becker to Dismiss, briefs in support of motion and cert. of service, filed.

Aug. 29 Answer to motion of Della Becker to dismiss, filed.

Sept. 4 Defts' Motion to Stay Proceedings and Certificate of Service thereof, filed

Sept. 12 Memorandum of Law supporting motion to stay proceedings submitted by defts, Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster & School District of Lancaster, filed.

Sept. 12 Certificate of service of Memor. of Law supporting Motion to Stay Proceedings, filed.

Oct. 6 Plff's consolidated memorandum of law in opposition to deft Della Becker's Motion to Dismiss & other deft's motion to stay proceedings, filed.

Nov. 24 Order dd. 11/21/75 that motion of defts, Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster & School District of Lancaster, to stay proceedings in this Court is GRANTED, etc.; pending resolution of the related cases filed in Court of Common Pleas, Lancaster. Further ordered that the motion of deft. Della Becker, to dismiss Complaint is DENIED without prejudice, etc., filed. (MT)
(11/21/75 copies mailed—11/25/75 entered)

Nov. 24 Order dd. 11/21/75 staying these proceedings pending disposition of a related action; Ordered that the Clerk of Court mark this action closed for statistical purposes & placed in Civil Suspense File, etc., filed. (11/21/75 copies mailed—11/25/75 entered) (MT)